87-458

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1987

ANTONIO NIEVES
and
ELLEN SCHUSTER NIEVES, *Petitioners,*

—*v.*—

HESS OIL VIRGIN ISLANDS CORPORATION,
Respondent.

SAMUEL COTTO, *Petitioner,*

—*v.*—

HESS OIL VIRGIN ISLANDS CORPORATION,
Respondent.

JOSEPH R. TAYLOR, *Petitioner,*

—*v.*—

HESS OIL VIRGIN ISLANDS CORPORATION,
Respondent.

GEORGE THOMAS, *Petitioner,*

—*v.*—

HESS OIL VIRGIN ISLANDS CORPORATION,
Respondent.

PAULIPHY PREVOST, *Petitioner,*

—*v.*—

HESS OIL VIRGIN ISLANDS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

When the United States Congress and a territorial legislature each enact parallel amendments to correct the same judicial misinterpretation of their respective workmen's compensation acts (*Washington Metro Area Transit v. Johnson*, 467 U.S. 925 (1984), and *Vanterpool v. Hess Oil Virgin Islands Corp.*, 766 F. 2d 117 (3rd Cir. 1985)), and the Congressional amendment is sustained against a Fifth Amendment due process challenge, (*Louviere v. Marathon Oil Co.*, 755 F. 2d 428 (5th Cir. 1985)), does the contract clause of the United States Constitution, Article I, Sec. 10, impose additional burdens on the territorial legislature, above those imposed on Congress by the Fifth Amendment particularly where the contract right implicated is merely an implied term of the economic legislation being amended.

II.

When a territorial legislature passes a curative retroactive amendment to restore rights to persons whose rights were denied them by an erroneous judicial interpretation of a statute, does the Constitution require a minimum number of such persons be affected before the curative amendment can pass constitutional scrutiny.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Court of Appeals were Antonio Nieves and Ellen Schuster Nieves, Samuel Cotto, Joseph R. Taylor, George Thomas, and Pauliphy Prevost, petitioners herein; Hess Oil Virgin Islands Corporation, respondent herein; and Phillip Scotland and Perline Scotland, whom petitioners believe have no interest in the outcome of this petition and have therefore not been named as parties hereto.

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OPINIONS BELOW

The opinion for the United States Court of Appeals for the Third Circuit, reported at 819 F.2d 1237 is printed in Appendix "A". The opinion of the United States District Court of the Virgin Islands, Division of St. Croix, in *Prevost v. Hess Oil Virgin Islands Corp.*, is reported at 640 F.Supp 1220 (D.V.I. 1986). That opinion and the order certifying an interlocutory appeal are reproduced in Appendices B & C. The District Court's opinion involving the remaining petitioners is printed in Appendix "D".

JURISDICTION

The Judgments of the United States Court of Appeals for the Third Circuit (reproduced as Appendix "E" and "F") were entered on May 22, 1987. Timely petitions for rehearing were denied on June 18, 1987, in Prevost and June 22 for the remaining petitioners. (Appendix "G" and "H"). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

The Third Circuit Court of Appeals has not certified to the Virgin Islands' Attorney General the fact that the constitutionality of a statute of the Virgin Islands was drawn into question and declared unconstitutional by the Court. Petitioners have requested the Court to so notify the Attorney General but the Court has not yet acted.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. I, Sec. 10, Cl. 1, provides:

No State shall . . . pass any . . . Law impairing the Obligation of Contracts, ...

United States Constitution, Amendment V, provides:

No person shall . . . be deprived of . . . property, without due process of law; . . . .

STATUTE INVOLVED

The challenged amendment to the Virgin Islands Workmen's Compensation Act, Title 24 V.I.C. Section 284, of the V.I. Code Annotated, provides in pertinent part:

> Section 1. (a) Title 24, Section 284, Virgin Islands Code, is amended by designating the existing language as subsection (a) and adding a new subsection (b) to read as follows:
>
> (b) . . . The "statutory employer and borrowed servant" doctrine are not recognized in this jurisdiction, and an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under Section 272 of this title.
>
> (b) Title 24, Section 284, Subsection (b), as added by Section 1 of this Act shall apply to:
>
> (1) claims filed after the effective date of this Act; and
>
> (2) claims pending as of the effective date of this Act;
>
> regardless of when the accident which gave rise to the claim occurred.

STATEMENT OF THE CASE

Petitioners were injured prior to 1984 while working at the Hess Oil Virgin Islands Corp. (HOVIC) refinery as employees of a contractor, Litwin Panamerican, Inc. They brought individual suits under 48 U.S.C. 1612(b) by mid 1984 against HOVIC charging negligence. HOVIC answered by pleading that petitioners were HOVIC employees pursuant to the "borrowed employee" doctrine, and hence HOVIC was entitled to the protection of the local workmen's compensation statute, 24 V.I.C. Sec. 284, that bars employees from suing their employer for injuries.

During the pendency of petitioners' suits, the District court on June 7, 1984, in a different case, for the first time interpreted the local workmen's compensation act as embodying the "borrowed employee" doctrine and thus barring injured workers from suing their secondary employer. *Vanterpool v. Hess Oil Virgin Islands Corp.*, 589 F. Supp. 334 (D.V.I. 1984). An interlocutory appeal was filed with the Third Circuit Court of Appeals.

On October 19, 1984, during the pendency of the interlocutory appeal, the Virgin Islands Legislature acted swiftly to correct what it considered an erroneous interpretation of its Workmen's Compensation Act. It amended Secs. 2 and 3 of the Act to expressly abolish the borrowed employee doctrine as against the public policy of the territory:

> Abrogation of the borrowed employee doctrine: It shall not be a defense to any action brought by or on behalf of any employee, that the employee, at the time of his injury or death, was the borrowed, loaned, or rented employee of another employer. Any oral or written agreement between an employer and employee which makes the employee the borrowed, loaned, or rented employee of another employer shall be null and void as being against the public policy of this territory.

The Third Circuit in June, 1985 approved the District Court decision applying the borrowed employee doctrine to the workmen's compensation act. *Vanterpool v. Hess Oil Virgin Islands Corp.*, 766 F.2d 117 (3d Cir. 1985), *cert den.* 106 S.Ct. 801 (1986). By footnote the Circuit declared the October 1984 curative amendment to be prospective only.

After the Circuit's ruling in *Vanterpool, supra*, the District Court in December, 1985, dismissed all of petitioners' suits, except Prevost's, as barred by the borrowed employee doctrine. These petitioners filed appeals to the Third Circuit. During the pendency of these appeals, the Virgin Islands Legislature again acted. On February 27, 1986, the Legislature again enacted a curative amendment to the workmen's compensation act declar-

ing that the abrogation of the borrowed employee doctrine was to be applicable to all claims filed after the date of the Amendment and to all claims pending as of the date of the amendment (such as the petitioners' claims which were concededly pending) regardless of when the accident which gave rise to the claim occurred. The legislature articulated three public purposes supporting the retroactive application of the amendment: first, to cure the recent judicial interpretation of the Act granting secondary employers immunity from suit, an immunity never intended by the legislature; second, to assist injured workers; and third, to aid the Commissioner of Labor in recouping sums paid to workers injured by third party tortfeasors. Thus a clear purpose and intent of the Legislature was to eliminate the recently judicially created borrowed employee defense from all claims not then barred by the statute of limitations, and not merely from all claims filed thereafter.

The Virgin Islands Legislature explained in the legislative history accompanying the retroactive amendment that it was adopting language recently employed by Congress to achieve a like result in the federal workman's compensation law, the Longshoreman's and Harbor Worker's Compensation Act (LHWCA), which had undergone an evolution virtually identical to Virgin Islands compensation law. In *Washington Metro Transit Authority v. Johnson*, 467 U.S. 925 (1984), the Court interpreted LHWCA as granting immunity to a general contractor for suits brought by a subcontractor's workers. Within three months, Congress amended LHWCA, negating the holding of *Washington Metro Transit Authority* and limiting the contractor's immunity from suit by employees of the subcontractor. Congress made the amendment applicable to all pending claims. It was sustained against a due process attack, *Louviere v. Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985), and provided the model for the Virgin Islands legislation under attack here.

On August 7, 1986, while petitioners' claims were pending before the Third Circuit, the District Court rendered its decision in Prevost's case, in which HOVIC had attacked the retroactive

provision (i.e. its application to pending claims) of the curative amendment as unconstitutional. The District Court avoided the constitutional attack by holding that the relationship between employers and employees involves a status relationship rather than a contractual one, citing *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423 (1923) and sustained the retroactive application of the Amendment, permitting Prevost to pursue his suit against HOVIC. *Prevost v. Hess Oil Virgin Islands Corp.*, 640 F.Supp. 1220 (D.V.I. 1986). An interlocutory appeal was granted and Prevost's appeal was consolidated with the remaining petitioners' appeals pending in the Circuit. The Third Circuit reversed in a two to one decision (rehearing and rehearing en banc denied). The majority opinion rejected the District Court's analysis of the statute that avoided a constitutional inquiry. In holding the statute unconstitutional, the majority declared that the borrowed servant doctrine was an implied term in implied contracts of employment between HOVIC and its contractors' employees, and thus the curative legislation retroactively eliminating the borrowed servant doctrine implicated and violated the Contract Clause.

The majority recognized that the parallel congressional statute passed constitutional scrutiny in *Louviere v. Marathon Oil Co., supra*, 755 F.2d 428 and attempted to distinguish it on two grounds. First, the majority concluded that the Due Process Clause imposes "less searching standards" in reviewing economic legislation than does the Contract Clause, with the result that economic and remedial legislation of states and territories is to be subjected to higher scrutiny than identical legislation by Congress. Second, the majority assumed that the retroactive provision of the curative amendment would apply to only six injured workers who would otherwise be denied the right to sue HOVIC for their injuries. The majority felt that this was too small a class to be entitled to relief and held the amendment to be "special legislation," and consequently violated the Contract Clause. The majority ruled that when HOVIC entered into implied contracts of hire with petitioners, years before the *Vanterpool* decision, HOVIC was justified in

anticipating that the borrowed servant doctrine would be read into the statute, and that such anticipatory expectancy was protected by the Contract Clause.

REASONS FOR GRANTING WRIT

Two reasons support granting the writ. First, the Circuit's conclusion that the Contract Clause requires stricter scrutiny of remedial economic legislation passed by states and territories than is required of identical Congressional legislation is an erroneous Constitutional principle. This issue has never been directly confronted by the Supreme Court. The Third Circuit's rule produces the unfair and anomalous result of preventing local governmental bodies from following Congress' lead and curing on the local level ills identified by Congress in the manner adopted by Congress. The Constitution cannot stand for the principle that Congress can rectify an erroneous judicial interpretation of a federal workmen's compensation statute (LHWCA) with retroactive application, while a territory cannot rectify an identical erroneous interpretation of its workman's compensation act using language identical to Congress' and with the same retroactive effect. Yet such is the square holding of the Third Circuit in this case.

Surely the Contract Clause ought not to impose a burden on the power of the Legislature to continue to enact legislation in an area that has been historically subject to extensive regulation involving the shifting of economic burdens and benefits between employers and employees, particularly when the alleged contract right implicated is merely an implied term of prior legislation on the topic. No employer in such a heavily regulated area of legislation could have legitimate reasonable expectations that the benefits and burdens previously imposed were to remain static. As the time of petitioner's injuries, HOVIC certainly had no reasonable expectation that the Virgin Islands Courts would read the borrowed servant doctrine into the Workmen's Compensation Act.

Second, when a Territorial Legislature articulates the public purpose for enacting a curative amendment as righting a perceived wrong, the Constitution does not require there to be a minimum number of affected persons before the legislation can pass constitutional scrutiny. In a small jurisdiction such as the Virgin Islands, the number of affected workers is perforce small. The Territorial Legislature articulated that the public purpose for the curative amendment was to abolish the recently judicially created borrowed employee defense from all claims not then barred by the Statute of Limitations. The legislature intended all injured workers whose claims were still pending to have restored to them their right to sue secondary employers whose negligence had injured them, which right had been wrongfully denied them by a misinterpretation of the Statute. The majority opinion rejected the retroactive curative amendment as unconstitutional since its reach was limited to "those six plaintiffs" whose right to bring a suit against the secondary employer, HOVIC, had been denied by its previous judicial interpretation of the workmen's compensation statute. Because the number of affected persons whose rights were being restored amounted to only six, the majority characterized the amendment as "special interest legislation." Surely the Constitution places no barriers on a Territorial Legislature's powers to right a perceived wrong merely because another tribunal finds the number of wrongs righted to be insignificant.

The retroactive amendment, on its face, singles out no employers or employees for special treatment. It applies to all. Moreover, when the legislature passed the amendment, it had no way of predicting how many workers or employers it would ultimately affect. Since the legislation was inclusive on its face, and since the number of workers and employers affected could not be ascertained until the statute of limitations had run on all potential claims, the amendment does not involve special interest legislation. There is no way to square the majority's characterization of the amendment as such with the statute's wording or anything else in the record.

CONCLUSION

The Third Circuit has declared violative of the Contract Clause a legislative enactment in a highly regulated economic sphere, made retroactive to cure an earlier erroneous judicial interpretation, and modelled after an identical retroactive Congressional enactment designed to accomplish the same end which was sustained against Due Process attack by the Fifth Circuit. To reach this result, the Circuit had to overrule a District Court opinion that avoided the Constitutional issue, and further had to rule that state and territorial economic legislation is subject to stricter judicial scrutiny than identical Federal enactments. These are matters of major Constitutional import. Accordingly, this petition for a writ for certiori should be GRANTED.

Respectfully submitted,

The Petitioners,

ANTONIO NIEVES and
ELLEN SCHUSTER NIEVES

SAMUEL COTTO

JOSEPH R. TAYLOR

GEORGE THOMAS

and

PAULIPHY PREVOST

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Nos. 86-3049, 86-3065 to 86-3067,
86-3584 and 86-3585.

United States Court of Appeals,
Third Circuit.

Argued Dec. 1, 1986.
Decided May 22, 1987.

ANTONIO NIEVES
and
ELLEN SCHUSTER NIEVES, *Appellants,*
v.
HESS OIL VIRGIN ISLANDS CORPORATION.

SAMUEL COTTO, *Appellant,*
v.
HESS OIL VIRGIN ISLANDS CORPORATION.

JOSEPH R. TAYLOR, *Appellant,*
v.
HESS OIL VIRGIN ISLANDS CORPORATION.

GEORGE THOMAS, *Appellant,*
v.
HESS OIL VIRGIN ISLANDS CORPORATION.

PHILLIP SCOTLAND
and
PEARLINE SCOTLAND
v.
HESS OIL VIRGIN ISLANDS CORPORATION,
Appellant,

PAULIPHY PREVOST
v.
HESS OIL VIRGIN ISLANDS CORPORATION,
Appellant.

REHEARING AND REHEARING IN BANC IN
NOS. 86-3049, 86-3065 TO 86-3067, AND 86-3585
DENIED JUNE 18 AND JUNE 22, 1987.

In workers' compensation suits filed prior to passage of 1986 amendment to Workmen's Compensation Act, which eliminated borrowed-employee doctrine as defense to all pending cases, borrowing employer moved for summary judgment based on borrowed-employee doctrine, and employees countered by asserting that 1986 amendments should retroactively apply to pending cases. Employer challenged constitutionality of 1986 amendment, and moved for summary judgment. The United States District Court for the District of the Virgin Islands, David V. O'Brien, J., 640 F.Supp. 1220, denied motions and employer appealed. The Court of Appeals, Sloviter, Circuit Judge, held that: (1) contract clause reaches terms implied in contract and implied contracts as well; (2) employer's reliance on immunity from tort liability to its borrowed employees was not unjustifiable; (3) expectation of employer was impaired through retroactive application of statute which abolished borrowed-employee defense in pending cases; and (4) retroactive legislation was not justified, and thus, constituted violation of contract clause.

Ordered accordingly.

Stapleton, Circuit Judge, filed dissenting opinion.

1. Constitutional Law • 115

In order to determine whether retrocative legislation impairs contract in violation of contract clause, court examines whether law has operated as substantial impairment of contractual relationship, after challenging parties demonstrate that they possess contractual rights or obligations altered by law, whether government entity, in justification, had significant and legitimate public interest behind regulation, and if so, whether adjustment of rights and responsibilities of contracting parties was based upon reasonable conditions and was appropriate to public purpose justifying legislation's adoption. Revised Organic Act of the Virgin Islands, § 3, 48 U.S.C.A. § 1561; U.S.C.A. Const. Art. 1, § 10, cl. 1.

2. Constitutional Law • 146
Workers' Compensation • 56

Retroactive application of amendment to Workmen's Compensation Act, which eliminated borrowed employee doctrine, neither altered nor affected terms of express contract for provision of employees to borrowing employer at specified costs, and thus, contract between borrowing employer and loaning employer was not substantially impaired in violation of contract clause. 24 V.I.C. §§ 263a, 284(b).

3. Constitutional Law • 113

Contract terms implied under state law are protected by federal contract clauses, as are implied contracts. U.S.C.A. Const. Art. 1 § 10, cl. 1.

4. Workers' Compensation • 2084

Term of implied contract between hiring employer and borrowing employer was borrowing employer's immunity from tort actions by borrowed employees, where borrowing employer reimbursed hiring employer for workmen's compensation insurance payments made for borrowed employees.

5. Workers' Compensation • 58

Retroactive application provision in amended statute, which abolished borrowed-employee defense in pending cases, represented substantial impairment of borrowing employer's expectations which arose out of contract between borrowing employer and borrowed employees, to effect that borrowed employees could not bring tort action against it, and such reliance on immunity from tort liability from its borrowed employees was justifiable, given fact that there were no Virgin Island cases interpreting statute to exclude borrowed-employee doctrine and other case demonstrated wide acceptance of borrowed-employee doctrine in workmen's compensation cases. 24 V.I.C. §§ 263a, 284(b).

6. Constitutional Law • 115

Determination as to whether impairment of contract is permitted under Federal Constitution will depend upon whether statute causing impairment can be justfied on basis of significant and legitimate public purpose that reasonably accommodates rights and responsibilities of contracting parties. U.S.C.A. Const. Art. 1, § 10, cl. 1.

7. Constitutional Law • 70.3(6, 7)

Courts are required to defer to legislature's judgment concerning necessity and reasonableness of economic and social legislation.

8. Constitutional Law • 121(1)

Legislative judgment regarding retroactive application of provision of statute which impairs contractual obligations is subject to stricter scrutiny when state is contracting party, than when legislation affects only private contracts.

9. Workers' Compensation • 1910

Deferential standard of review was applicable in determining whether adjustment of contractual expectations of borrowing employer by retroactive application of amendment to Workmen's Compensation Act, which eliminated borrowed-employee doctrine as defense in all pending tort cases, was reasonable, in that Virgin Island's self-interest in preservation of workmen's compensation fund did not require treating Virgin Islands as contracting party. 24 V.I.C. §§ 263a, 284(b).

10. Constitutional Law • 253(4)

Legislation aimed retroactively to benefit or burden a few identifiable persons is particularly vulnerable to charge that it is not reasonably related to asserted public purposes in due process context. U.S.C.A. Const. Amends. 5, 14.

11. Workers' Compensation • 58

Impairment of borrowing employer's contractual expectations, that by paying workmen's compensation benefits

due from borrowed employees' employer, it would not be liable for borrowed employee's tort claim, through retroactive application of workmen's compensation provision which abolished borrowed-employee defense in pending cases, could not be justified as law enacted to protect broad societal interest rather than narrow class, where enactment of statute which abolished borrowed-employees doctrine satisfied legislature's enunciated aim of protecting Virgin Island's workers, but there was no general welfare to be served by later amendment of statute to provide for retroactive application which could affect at most six or seven pending cases involving same borrowing employer; thus, retroactive application provision violated contract clause. 24 V.I.C. §§ 263a, 284(b); U.S.C.A. Const. Art. 1, § 10, cl. 1.

12. Federal Civil Procedure • 2497

No genuine question of material fact existed as to whether employee who was injured while working for borrowing employer held status of borrowed employee, merely because he took instruction from an employee, who unknown to him, was actually also a "loanee," or because employee claimed that his signature on loanee form was forgery, where employee was performing borrowing employer's work on his property, and with use of his equipment, and where signature on loanee form was remarkably similar to signatures of employee on numerous exhibits attached to his opposition to motion for summary judgment.

13. Workers' Compensation • 2104

Particular type of work performed by employee was not determinate factor in deciding whether he was borrowed employee, for purposes of determining whether employee could bring tort acted against borrowing employer.

14. Workers' Compensation • 207

Notwithstanding fact that employee could not read English when he signed consent to work as loanee with borrowing employer, his consent was valid, and thus, he performed as borrowed employee.

John K. Dema, John K. Dema, P.C., Christiansted, St. Croix, U.S. Virgin Islands, for Antonio Nieves and Ellen Schuster Nieves, appellants in No. 86-3049.

Thomas Alkon, Gordon C. Rhea (argued), Christiansted, St. Croix, U.S. Virgin Islands, for Samuel Cotto, appellant in No. 86-3065, Joseph R. Taylor, appellant in No. 86-3066 and George Thomas, appellant in No. 86-3067.

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John R. Coon, Christiansted, St. Croix, U.S. Virgin Islands, for Pauliphy Prevost, appellee in No. 86-3585.

Britain H. Bryant, Nancy V. Young, St. Croix, U.S. Virgin Islands, M. David Gelfand (argued), New Orleans, La., for Hess Oil Virgin Islands Corp., appellee in No. 86-3049, No. 86-3065, No. 86-3066, and No. 86-3067, appellant in No. 86-3584 and No. 86-3585.

Before SLOVITER, STAPLETON and ROSENN, Circuit Judges.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

The issue on appeal is whether the Virgin Islands legislature's amendment of the Virgin Islands Workmen's Compensation Act (the Act) to retroactively eliminate application of the "borrowed employee" doctrine as a bar to pending tort suits constitutes an unjustified impairment of the contractual obligations of Hess Oil Virgin Islands Corporation (Hess or HOVIC), or a violation of Hess' due process rights. Six employees of Litwin Panamerican, Inc. (Litwin) who were injured while on loan to and working for Hess filed separate tort actions against Hess. In each case, Hess moved for summary judgment on the basis of the "borrowed employee" doctrine under which work-

men's compensation was the employee's exclusive remedy. In four of the cases, Hess' motions were granted. The legislature then amended the Act, and Hess' motions in the two remaining cases were denied. Appeals are before us in all six cases. Our jurisdiction rests on 28 U.S.C. §§ 1291, 1292(b).

I.

Facts

A. The "Borrowed Employee" Doctrine

In 1976, Hess and Litwin entered into an agreement, amended in 1980, whereby Litwin was to provide personnel to perform general maintenance and turnaround work at Hess' St. Croix refinery. Under the agreement, Litwin workers were divided into two classes. Employees in the class involved here, Type-I personnel, were furnished "as loanees under HOVIC's direction and control in the numbers and by skills as ordered from time to time by HOVIC." Nieves App. at 25.[1] Hess assumed "direct supervision, direction and control" over these employees and Litwin was not "responsible to HOVIC or liable for the workmanship of such personnel or for any mistake, error or act of negligence of such personnel." Nieves App. at 24. Litwin was responsible for maintaining "at its own expense" Virgin Islands workmen's compensation insurance, any other statutorily required workmen's compensation insurance and employer's liability insurance against common law claims. Nieves App. at 32. With respect to Type I work, Hess agreed to "defend, indemnify and hold [Litwin] harmless from any and all loss, damage, injury, liability, claim, demand, cause of action and judgment for personal injuries or death or for damage to or loss of property . . . from any occurrence resulting

1. Under the agreement, Type I work is defined as that performed by Litwin employees who "have been loaned to HOVIC and are under HOVIC's direct supervision, direction and control." Nieves App. at 24. Type II work is defined as that over which Litwin "has responsibility for direct supervision, direction and control." Nieves App. at 24-25.

from the performance of said work under this Agreement. . . ." Nieves App. at 33-34. When hiring employees to serve as Type-I employees on loan to Hess, it was Litwin's practice to have them sign a Hess loanee form. That form states:

> This is to inform you of the conditions under which you will be working as a "HESS LOANEE". You should be aware that while working as a loanee:
>
> 1. HOVIC personnel will control, direct, and supervise all aspects of your work.
>
> 2. At no time should you receive, or act under instructions from Litwin Supervision.
>
> 3. HOVIC will provide you with safety equipment and will ensure that all safety conditions surrounding your work are met.

Nieves App. at 61.

George Vanterpool, originally hired by Litwin as a Type-I employee in 1976, brought suit against Hess seeking damages for injuries sustained as a result of Hess' alleged negligence while Vanterpool was on loan to Hess in 1981. At that time, the exclusive remedy provision of the Virgin Islands Workmen's Compensation Act stated:

> When an employer is insured under this chapter, the right herein established to obtain compensation shall be the only remedy against the employer.

24 V.I.C. § 284 (1970). In 1984, the district court held that under the borrowed employee doctrine this section could apply to bar Vanterpool's tort action against Hess, his borrowing employer. *See Vanterpool v. Hess Oil Virgin Islands Corp.*, 589 F.Supp. 334, 339 (D.V.I.1984), *aff'd in part and rev'd in part 766 F.2d 117 (3d Cir. 1985), cert. denied*, —U.S.—, 106 S.Ct. 801, 88 L.Ed.2d 777 (1986). Under the common law borrowed employee doctrine:

> . . . if a special (borrowing) employer exercised a sufficient degree of control over a borrowed employee for a

> time sufficient to suggest that the employee has assessed the risks of his new employment and has acquiesced in his borrowing employer's control, the borrowing employer may be deemed a statutory employer for purposes of workers' compensation. . . . The borrowed employee is then barred from suing his borrowing employer for injuries sustained during the course of his employment; instead, the borrowed employee is remitted to the exclusive remedy provided by the relevant workers' compensation act.

Vanterpool v. Hess Oil Virgin Islands Corp., 766 F.2d 117, 121 (3d Cir.1985).

The district court's holding was the first application of the borrowed employee doctrine in the Virgin Islands. In response, on October 19, 1984, the Virgin Islands legislature added to the Workmen's Compensation Act a section abrogating the borrowed employee doctrine. That section states:

> It shall not be a defense to any action brought by or on behalf of an employee, that the employee at the time of his injury or death was the borrowed, loaned, or rented employee of another employer. Any oral or written agreement between an employer and employee which makes the employee the borrowed, loaned or rented employee of another employer shall be null and void as being against the public policy of this Territory.

24 V.I.C. § 263a (1986).

Although section 263a had been enacted when Vanterpool's appeal came before this court, we referred to it in a footnote only, stating that the "amendment's effect is prospective only." *Vanterpool*, 766 F.2d at 119 n. 1. We agreed with the district court that the borrowed employee doctrine was applicable in the Virgin Islands. *Id.* at 121-26.

On January 23, 1986, the Virgin Islands Legislature amended the exclusive remedy provision of the Workmen's Compensation Act, adding a statement that:

> The "statutory employer and borrowed servant" doctrine are not recognized in this jurisdiction, and an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of Insurance issued under Section 272 of this Title.

Bill No. 498, 16th Legislature § 1(a) (1986) (to be codified at 24 V.I.C. § 284(b)), Nieves App. at 150. This provision, to be codified as 24 V.I.C. § 284(b), does not appear to be substantively different from the 1984 amendment codified as 24 V.I.C. 263a in its effect on the borrowed employee doctrine. However, the proposed addition was made applicable not only to claims filed after the effective date of the amendment but also to "claims pending as of the effective date of this Act: regardless of when the accident which gave rise to the claim occurred." Bill No. 498, 16th Legislature § !(b) (1986), Nieves App. at 151. On February 5, 1986, the Governor of the Virgin Islands vetoed the Bill, referring to the effect of its retrospective application in the six pending cases presently before us on appeal, *See Prevost v. Hess Oil Virgin Islands Corp.*, 640 F.Supp. 1220, 1221-22 n. 2 (D.V.I.1986). On February 27, 1986, the veto was overridden and the bill, including the retroactive application provision, became law. *Id.*

B. The Current Proceedings

Each of the six cases before us was brought by a borrowed employee of Hess who sued Hess for injuries allegedly caused by Hess' negligence. Each case was pending at the time the retrocative application provision became law.

Antonio Nieves was hired by Litwin on June 27, 1983, and was assigned to work at Hess as a heavy equipment mechanic. On September 28, 1983, while on loan to Hess, he fell from a cherry picker and suffered a double hernia and nerve damage in his pelvic area. He filed his complaint against Hess on

December 3, 1984. On November 1, 1985, the district court granted Hess summary judgment on the ground that Nieves was "the borrowed employee of HOVIC. HOVIC is therefore immune from Nieves' suit." *Nieves v. Hess Oil Virgin Islands Corp.*, No. 84-336, slip op. at 5 (D.V.I. Nov. 1, 1985), Nieves App. at 178.

Joseph Taylor began intermittent employment with Litwin in 1976. On April 2, 1984, after five months of continuous employment on loan to Hess, he suffered a back injury as the result of a scaffold collapse. He filed his complaint on July 11, 1984. On September 18, 1985, the district court granted Hess summary judgment on the basis of the borrowed employee doctrine. *Taylor v. Hess Oil Virgin Islands Corp.*, No. 84-205 (D.V.I. Sep. 18, 1985), Taylor App. at 137-44.

George Thomas was a Litwin employee on loan to Hess. On March 20, 1982, while working at Hess, he suffered a back injury from a manhole cover collapse. On February 23, 1983, he filed his complaint against Hess. On September 18, 1985, the district court granted Hess summary judgment on the basis of the borrowed employee doctrine. *Thomas v. Hess Oil Virgin Islands Corp.*, No. 83-93 (D.V.I. Sep. 18, 1985), Thomas App. at 6-16.

Samuel Cotto had worked intermittently for Litwin for several years and was hired again on May 30, 1984 to serve as a scaffolder on loan to Hess. On May 31, 1984, while on loan to Hess, he suffered back injuries from a falling pipe. On November 8, 1984, he filed his complaint against Hess. On November 1, 1985, the district court granted Hess summary judgment on the basis of the borrowed employee doctrine. *Cotto v. Hess Oil Virgin Islands Corp.*, No 84-318 (D.V.I. Nov. 1, 1985), Cotto App. at 129-37.

Each of the four plaintiffs moved for reconsideration under Fed.R.Civ.P. 59 in light of the legislature's addition to the Workmen's Compensation Act of section 263a. On December 12, 1985, the district court denied the motions for reconsideration in all four cases. Citing the conclusion of this court in

Vanterpool, 766 F.2d at 119 n. 1, that section 263a was to have prospective effect only, the court stated:

> Clearly, the Third Circuit considered, as we do, that to apply the statute retroactively in litigation involving only private parties, would be a manifest injustice to one of the parties who, acting under existing law, made significant and legitimate business decisions. What the plaintiffs actually seek is to have those legitimate business decisions, legal when made, declared illegal *ex post facto*. That is what the effect of a retroactive application of the amendment adopted by the Virgin Islands Legislature would be.

Nieves v. Hess Oil Virgin Islands Corp., No. 84-336, slip op. at 3 (D.V.I. Dec. 12, 1985), Nieves App. at 182. Nieves, Taylor, Thomas and Cotto all appeal from the district court's grant of summary judgment to Hess and its subsequent denial of reconsideration. We have jurisdiction over their appeals under 28 U.S.C. § 1291. Our review of the grant of summary judgment is plenary.

Pauliphy Prevost and Phillip Scotland were also Litwin employees on loan to Hess when they suffered injuries. Prevost had been hired by Litwin for work as a Hess loanee 27 times since 1977. On December 5, 1983, while working at the Hess refinery, he suffered injuries as a result of inhaling hydrogen sulfide fumes. Prevost's complaint seeking damages from Hess was filed in 1984. On August 19, 1985, Hess moved for summary judgment on the basis of the borrowed employee doctrine. Prevost App. at 12-25.

Scotland was hired by Litwin as a Hess loanee in 1982. On May 23, 1983, while constructing a dock at the Hess refinery, he injured a finger. Scotland's complaint seeking damages from Hess was filed in 1985. On January 14, 1986, Hess moved for summary judgment on the basis of the borrowed employee doctrine. Scotland App. at 13-26.

The district court did not rule on Hess' motions for summary judgment in *Prevost* and *Scotland* until August 7,

1986, after the 1986 amendment of section 284 and enactment of the provision giving the newly enacted section 284(b) retroactive application. Rejecting Hess' argument that retroactive application of the amendment constituted either an unjustified impairment of contractual obligations or a violation of due process, the court applied the amendment to the actions before it, and concluded that "the borrowed employee doctrine is no longer a valid defense." *Prevost v. Hess Oil Virgin Islands Corp.*, 640 F.Supp. at 1225. The court, therefore, denied Hess' motions for summary judgment.

Following certification by the district court pursuant to 28 U.S.C. § 1292(b) that its orders in *Prevost* and *Scotland* involved a controlling question of law as to which there is substantial ground for difference of opinion, Hess filed a petition to appeal in both cases, which this court granted. Because the matter is one of law, our standard of review is plenary.

Hess does not contest the legislature's authority to abolish the borrowed employee doctrine in the Virgin Islands. Hence the prospective application of the statutes so providing is unchallenged. Hess limits its challenge to the legislature's right to enact a provision retroactively applying the abolition of the borrowed employee doctrine to cases already in litigation. We will refer throughout to that provision, which has not been codified, as the retroactive application provision.

II. Impairment of Contract

A. The Standard

[1] Hess contends that the retroactive application provision violates the Contract Clause of the United States Constitution, Art. I, § 10, cl. 1 ("[n]o state shall . . . pass any . . . law impairing the Obligation of Contracts") as extended to the Virgin Islands by the Bill of Rights of the Virgin Islands Revised Organic Act of 1954, 48 U.S.C. § 1561 ("No law impairing the obligation of contracts shall be enacted").

The Supreme Court has established a three-step analysis for determining whether retroactive legislation constitutes an impairmant of contract. The threshold inquiry is whether the law has operated "as a substantial impairment of a contractual relationship." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 549 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983) (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978)). As part of this threshold inquiry, those parties challenging the law bear the borden of demonstrating that they in fact possess contractual rights or obligations altered by the law. *Cf. National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.,* 470 U.S. 451, 472, 105 S.Ct. 1441, 1455, 84 L.Ed.2d 432 (1985).

If the law is found to constitute a substantial impairment, the second step is to determine whether the government entity, in justification, had a "significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." *Energy Reserves,* 459 U.S. at 411-12, 103 S.Ct. at 704. Finally, once such a legitimate public purpose is identified, the court must determine "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' " *Energy Reserves,* 459 U.S. at 412, 103 S.Ct. at 705 (quoting *United States Trust Co. v. New Jersey,* 431 U.S. 1, 22, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977)). That determination will necessarily depend upon whether the state is a party to the contract at issue. If it is not, " 'as is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " *Energy Reserves,* 459 U.S. at 412-13, 103 S.Ct. at 705 (quoting *United States Trust,* 431 U.S. at 22-23, 97 S.Ct. at 1518). If the state is a party to the contract, such deference is inappropriate, and the court may inquire whether a less drastic alteration of contract rights could achieve the same purpose and whether the law is

reasonable in light of changed circumstances. *United States Trust,* 431 U.S. at 25-26, 30-32, 97 S.Ct. at 1519-1520, 1521-1523.

This court has recently applied the three-step analysis in *Keystone Bituminous Coal Ass'n v. Duncan,* 771 F.2d 707, 717 (3d Cir.1985), aff'd, —U.S.—, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1981); and *Troy Ltd. v. Renna,* 727 F.2d 287, 797 (3d Cir.1984). We proceed to apply it to the law and contracts at issue here.

B. *Substantial Impairment*

[2] Ordinarily in Contract Clause cases, the contract that is claimed to be impaired is an express contract. *See, e.g., United States Trust,* 431 U.S. at 14, 17-18, 97 S.Ct. at 1513, 1515-1516 (covenant between New York and New Jersey and with bondholders to limit use of certain bond revenues retroactively repealed); *Allied Structural Steel,* 438 U.S. at 240, 98 S.Ct. at 2720 (state statute retroactively imposed requirements on pension fund in excess of those undertaken by terms of fund's prior contract). The only express contract which Hess claims is impaired is its agreement with Litwin under which Litwin provides employees to Hess at specified costs. However, the retroactive abolition of the borrowed employee doctrine neither alters nor affects the terms of that contract. Litwin can continue to provide Hess with borrowed employees, and thus that contract is not substantially impaired.

[3] The absence of an express contract affected by the change does not end our inquiry because Hess argues that the retroactive amendment provision substantially impairs its implied contracts of employment with the employees borrowed from Litwin. The Supreme Court made clear in *United States Trust* that contract terms implied under state law are protected by the Contract Clause:

> The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation

> and enforcement. "This Court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' " *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398, 429-430 [54 S.Ct. 231, 236-237, 78 L.Ed. 413] (1934), quoting, *Von Hoffman v. City of Quincy,* 4 Wall. 535, 550 [18 L.Ed. 403] (1867). See also *Ogden v. Saunders,* 12 Wheat. [213], at 259-260, 297-298 [6 L.Ed. 606 (1827)] (opinions of Washington and Thompson, JJ.). This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached.

431 U.S. at 19-20 n. 17, 97 S.Ct. at 1516 n. 17. If the Contract Clause reaches terms implied in a contract, it follows that it reaches implied contracts as well. This was the precise holding by the Supreme Court in *Mississippi ex. rel. Robertson v. Miller,* 276 U.S. 174, 179, 48 S.Ct. 266, 268, 72 L.Ed. 517 (1928), where the Court stated, "after services have been rendered by a public officer under a law specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed. And the constitutional protection [of the Contract Clause] extends to such contracts just as it does to those specifically expressed."

Our *Vanterpool* opinion was premised on our determination that there existed an "implied contract of hire between the borrowed employee and the borrowing employer." 766 F.2d at 122. Our holding was that a borrowing employer such as Hess could be a statutory employer under the Virgin Islands Workmen's Compensation Act and thereby exempt from tort suits by those borrowed employees who had consented to the contract of hire with Hess and who could be presumed to have acquiesced in the risks of the new employment. *Id.* at 127-28. The retroactive application provision would abolish Hess' insulation from tort liability for the work injuries of borrowed employees who filed suit before the enactment of the amendment. Thus, we must decide whether such a retroactive provision effects an impairment of the implied contract of hire between Hess and its employees.

Hess argues that workmen's compensation laws are treated as implied terms of contracts of employment. It points to ten jurisdictions so holding[2] and contends that the district court was bound to apply this approach because this is the rule of common law "generally understood and applied in the United States."[3]

The district court examined the conflicting schools of thought viewing workmen's compensation laws either as contractual or as based on the status of the employer-employee relationship. It opted for the latter position, stating that the workmen's compensation law is "incidental to the employment relationship and not an implied term of the employment contract." *Prevost*, 640 F.Supp. at 1224.[4] The court concluded that the retroactive application provision worked a change only in "the status of the employer-employee relationship" and did

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2. Seven of the jurisdictions cited by Hess have held retroactive amendments of workmen's compensation laws uncontitutional impairments of rights arising from employment contracts. *See Mitchell v. United States Fidelity* and *Guaranty Co.*, 206 F.Supp. 489, 490 (E.D.Tenn. 1962); *Horton v. Fleming Co.*, 3 Kan.App.2d 121, 590 P.2d 594, 596-97 (1979); *Cooper v. Wicomico County, Dept. of Public Works*, 278 Md. 596, 599-600, 366 A.2d 55, 58 (1976); *Miller v. Norris Creameries*, 311 Minn. 343, 345, 250 N.W.2d 161, 162 (1976); *Harris v. National Truck Service*, 56 Ala.App. 350, 354, 321 So.2d 690, 693-94 (1975); *Miller v. Dunn Paper Co.*, 47 Mich.App. 471, 474, 209 N.W.2d 519, 521 (1973); *Noffsker v. K. Barnett & Sons*, 72 N.M. 471, 472, 384 P.2d 1022, 1023 (1963). Three of the jurisdictions cited by Hess have held in other contexts that workmen's compensation laws may be incorporated as terms of employment contracts. *See DeMartino v. Zurich Insurance Co.*, 307 F.Supp. 571, 573 (W.D.Pa1969), *aff'd*, 440 F.2d 1320 (3d Cir. 1971); *Matter of Injury to Spera*, 713 P.2d 1155, 1156-57 (Wyo.1986); *M. J. Daly Co. v. Varney*, 695 S.W.2d 400, 403 (Ky.1985).

3. Under 1 V.I.C. § 4,

   The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

not effect an impairment of contractual obligations. 640 F.Supp. at 1223-24.[5]

The following cases hold that compensation laws are incidental to the contract and may be changed retroactively without effecting an unconstitutional impairment. *K-Mart Corp. v. State Industrial Insurance System*, 101 Nev. 12, 18-20, 693 P.2d 562, 565-67 (1985); *Price v. All American Engineering Co.*, 320 A.2d 336, 339-40 (Del.1974); *McAllister v. Bd. of Education, Town of Kearny*, 79 N.J.Super. 249, 258-61, 191 A.2d 212, 217-18 (1963), *aff'd.*, 42 N.J. 56, 198 A.2d 765 (1964); *see also Kaiser Foundation Hospitals v. Workers' Compensation Appeals Bd.*, 87 Cal. App.3d 336, 349, 151 Cal.Rptr. 368, 376 (1978) ("liability under the Workmen's Compensation Act is incident to the status of employment and is neither in tort nor in contract"). Various courts have also held, in other contexts, that workmen's compensation laws are not contractual in nature. *See Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir.1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978) (coverage of Longshoremen's and Harbor Workers' Compensation Act is not contractual); *Jenkins v. Sal Chemical Co.*, 280 S.E.2d 243, 244 (W.Va.1981). The employees stress the statement in *Cudahy Packing Co. of Nebraska v. Parramore*, 263 U.S. 418, 423, 44 S.Ct. 153, 154, 68 L.Ed. 366 (1923), that "Workmen's Compensation legislation rests upon the idea of status, not that of implied contract." That was not a Contract Clause case, however, and the statement relied upon by the employees was directed only to the Court's conclusion that an employer could be liable under a state compensation statute for any injury causally related to employment rather than only for those injuries caused by the employer.

5. We agree with the district court that there is no clear trend in either the "contract" or "status" direction that would compel a result in this case under 1 V.I.C. § 4. *Id.* at 1223. *See* note 3 *supra.* Hess argues that the law of the Virgin Islands has already been determined to accept the contract analysis. It cites to *Jensen v. McInerney*, 299 F.Supp. 1309 (D.V.I.1969), in which our colleague, Judge Maris, sitting as a district court judge by designation, stated that, "As a statutory mandate upon the employer, [the provision of the Workmen's Compensation Act mandating coverage] was an implied term of the contract of employment." *Id.* at 1312 (footnote omitted). However, the issue in that case was whether the implied contract to insure could be a basis for jurisdiction and, therefore, although informative, that case is not dispositive.

In analyzing Hess' Contract Clause contention we must decide whether the implied contract of employment between Hess and its borrowed employees included as one of its terms the substitution of workmen's compensation benefits for the employees' common law tort remedies against their employer. Those jurisdictions that view the workmen's compensation laws as contractual would presumably hold that a borrowed employee's waiver of his or her common law remedies is an implied term of the contract between employer and employee. The status jurisdictions would presumably hold to the contrary. In making our determination as to whether waiver of tort remedies is a term of the contract, we believe it is more constructive for purposes of Contract Clause analysis to look to the expectations of the parties to the contract rather than to any formalistic classification.

Hess suggests that its contract with Litwin clearly reflects its expectation that its status as a borrowing employer under the Workmen's Compensation Act entitled it to the statutory immunity from tort liability to its borrowed employees. The Litwin contract imposes on Hess ultimate liability for claims from any occurrence resulting from the performance of Type I work by borrowed employees,[6] but imposes on Litwin the ultimate liability for claims from any occurrence resulting from the performance of Type II work by borrowed employees

6. The Hess-Litwin contract provides:

> E. *INDEMNIFICATION*
>
> 1. *Type I Work*
>
> Where Type I work is involved, [Hess] shall defend, indemnify and hold [Litwin] harmless from any and all loss, damage, injury, liability, claim, demand, cause of action and judgment for personal injuries or death or for damage to or loss of property, excluding [Hess'] property, from any occurrence resulting from the performance of said work under this Agreement and shall furnish [Litwin] with a waiver of underwriters' rights of subrogation on any insurance it may carry against such risks. Nieves App. at 33-34.

unless caused by the sole negligence of Hess.[7] The contract requires Litwin to maintain substantial comprehensive general liability insurance covering work classified both as Type I or Type II.

Although the contract requires Litwin to maintain workmen's compensation insurance, Nieves App. at 32, the comptroller of Hess filed an affidavit that avers that Hess reimburses Litwin for all payroll expenses for Type I personnel, including workmen's compensation contributions to the Government Insurance Fund, and that "[t]he expense of workmen's compensation contributions is one of the factors in the time and materials rate paid to Litwin for [the] services [of] Type I personnel while working for [Hess]." Weinman Affidavit, Nieves App. at 58. That affidavit is unrebutted, and thus we must accept the fact that Hess pays for the workmen's compensation insurance.

[4] Such a payment is the recognized quid pro quo for the employer's insulation from tort liability to its employees. *See Washington Metropolitan Area Transit Authority v. Johnson,* 467 U.S. 925, 931-32, 104 S.Ct. 2827, 2831-32, 81 L.Ed.2d 768 (1984); *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 282, 282 & n. 24, 101 S.Ct. 509, 516 & n. 24, 66 L.Ed.2d 446 (1980). It would be unrealistic to assume that Hess would have reimbursed Litwin for workmen's compensation insurance payments for Type I personnel unless Hess expected to benefit from the statutory tort immunity accruing to it as the statutory employer of those borrowed employees. The

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7. The Hess-Litwin contract further provides:

   a. *Type II Work*

   Where Type II work is involved, from commencement of work by [Litwin] on each work assignment and until [Litwin] completes said work and the unit or part thereof on which the work has been performed has resumed normal operations for a period of thirty (30) days, [Litwin] shall defend, indemnify and hold [Hess] harmless from any and all loss, damage, injury, liability, claim, demand, cause of action and judgment for personal injuries or death or for damage to or loss of property, including [Litwin's] property, from any occurrence resulting from the performance of said work under this Agreement, unless caused by the sole negligence of [Hess]. Nieves App. at 34

fact that Hess sought to assure itself of protection by an express provision in the contract mandating workmen's compensation insurance payments, together with the other insurance provisions allocating to Hess ultimate responsibility for Type I employees, demonstrates Hess' expectation that a term of the implied contract with the borrowed employees was its immunity from their tort suits.[8]

In *Vanterpool*, we considered the expectations of borrowed employees as to their loss of common law remedies. We held that a borrowed employee's consent to the implied contract of hire carried with it consent to the waiver of common law rights against the employer. 766 F.2d at 126-27. Of course, there may be a factual question as to a particular employee's status as a borrowed employee, an issue we discuss in Part III *infra*, but the concept that borrowed employees consent to a waiver of employer tort liability as a term of the implied contract of employment was the basis of the *Vanterpool* opinion, and is binding on us here. Thus, we conclude that tort immunity was a term of the implied contract.

That term of the contract is not necessarily protected from retroactive elimination. As the Court stated in *United States Trust*, "It is not always unconstitutional . . . for changes in statutory remedies to affect pre-existing contracts." 431 U.S. at 20 n. 17, 97 S.Ct. at 1516 n. 17. Only a substantial impairment will trigger the next step in Contract Clause analysis. The

8. Although the dissent phrases Hess' argument as a contention that rights vested at the time of an employee's injury, Dissent at page 1256, instead its claim is that the contractual relationship between Hess and the employee at the time of injury presupposed that recovery for such injuries would be pursuant to the workmen's compensation scheme. At the time of injury, Hess had no reason to expect any retroactively applicable change to its reasonable expectation that workmen's compensation, rather than tort based law, would govern. The first legislative amendment growing out of the decision in *Vanterpool*, was enacted on October 19, 1984. All of the injuries in this suit occurred before that time. Thomas was injured on March 20, 1982; Scotland on May 23, 1983; Nieves on September 28, 1983; Prevost on December 5, 1983; Taylor on April 2, 1984; and Cotto on May 31, 1984.

substantial impairment inquiry requires us to consider whether Hess could justifiably expect that the legislature would not retroactively eliminate its tort immunity. In *United States Trust*, before determining that the elimination of a statutory covenant constituted an impairment of contractual obligations, the Court found it necessary to engage in:

> a more particularized inquiry into the *legitimate* expectations of the contracting parties. The parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect the state law will remain entirely static. Thus a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement.

431 U.S. at 20-21 n. 17, 97 S.Ct. at 1517 n. 17 (emphasis added).

Similarly, in *Allied Structural Steel*, the Court looked to reliance in determining whether an employer's employment contract with its employees was impaired by a Minnesota law that retroactively imposed a pension funding obligation on employers who terminated their pension plan or closed their Minnesota office. The clauses of the employment contracts at issue in that case set out the employer's funding obligations and were drafted to comply with the then current law governing pensions. The employer's intention to rely on the clauses to limit its liability was evident. The question remained whether the employer could justifiably rely on the contractual limits in the face of changes in the statutory requirements. The Court held that it could:

> [T]he company was free to terminate or amend the pension plan at any time. The company thus had no reason to anticipate that its employees' pension rights could become vested except in accordance with the terms of the plan. It relied heavily, and reasonably, on this legitimate contractual expectation in calculating its annual contributions to the pension fund.

438 U.S. at 245-46, 98 S.Ct. at 2723. The Court held that the impairment effected by the Minnesota statute was severe since it retroactively modified the company's obligation in an area where reliance was vital, *id.* at 246, 98 S.Ct. at 2723, and "impos[ed] a completely unexpected liability in potentially disabling amounts." *Id.* at 247, 98 S.Ct. at 2724.

The district court apparently believed that Hess could not reasonably expect continuing immunity even in pending cases because "the borrowed employee doctrine had only recently been adopted in the Virgin Islands." *Prevost*, 640 F.Supp. at 1224. However, that overlooks that there were no Virgin Islands cases interpreting the statute to exclude the borrowed employee doctrine. Under those circumstances, and particularly in light of the wide acceptance in the United States of the borrowed employee doctrine in workmen's compensation cases, *see Vanterpool*, 766 F.2d at 123, 125, Hess' reliance on immunity from tort liability to its borrowed employees was not unjustifiable.[9]

The employees argue that because Hess, Litwin and the employees contracted in a "heavily regulated" area, Hess could not justifiably rely on the continuity of the statutory scheme. They rely on our decisions in *Galvan v. Hess Oil Virgin Islands Corp.*, 549 F.2d 281, 284-87 (3d Cir.1977), and *Troy, Ltd. v. Renna*, 727 F.2d at 287. In *Galvan*, we upheld retroactive extension of the statute of limitations for third party tort actions under the Workmen's Compensation Act. That case involved an issue of statutory interpretation; the Contract Clause was inapposite because there was no contract involved since suit was against third parties.

Troy did involve the Contract Clause, but we believe *Troy* does not govern this case. There we were dealing with a

9. At oral argument before this court, Hess attempted to demonstrate its knowledge of and reliance on the borrowed employee doctrine by reference to its motions to raise that defense in other cases in the Virgin Islands beginning as early as August 4, 1982, several years before the *Vanterpool* decision. Inasmuch as Hess failed to raise this issue in the district court and to support it there with affidavits or documents, we will not consider it for the first time on appeal.

statutory extension of the length of a preexisting statutory tenancy. We suggested that such an alteration was "probably not an impairment at all" because when the landlord " 'purchased into an enterprise already regulated in the particular to which he now objects';" he could not justifiably expect that no alteration of the regulations would occur. *Id.* at 297 (quoting *Veix v. Sixth Ward Building & Loan Ass'n.*, 316 U.S. 32, 38, 60 S.Ct. 792, 794, 84 L.Ed. 1080 (1940)). *See also Energy Reserves,* 459 U.S. at 416, 103 S.Ct. at 707 (where Kansas statute alters already regulated prices for natural gas, "reasonable expectations have not been impaired" by a change in those prices); *Colonial Penn Insurance Co. v. Heckler,* 721 F.2d 431, 442 (3d Cir.1983) (2½ year interval between notice given by Secretary to the insurance company and issuance of regulations that made Medicare benefits secondary to coverage provided by automobile policies gave automobile insurance company time to ease the impact of the change, so that insurance company could not contend regulations "upset any justified expectations").

The instant case is more closely related to *Allied Structural Steel* than to *Troy.* Concededly, when the contracts at issue were entered into, Hess was aware that certain aspects of the treatment of borrowed employees under the Workmen's Compansation Act were subject to change by the legislature, but Hess had no reason to anticipate that the legislature would make such a drastic change as retroactive elimination of Hess' coverage under the Act as the employer of borrowed employees, thereby subjecting it retroactively to tort liability to its borrowed employees.

[5] We view Hess' position as comparable to the employer in *Allied Structural Steel* who "had no reason to anticipate that its employees' pension rights could become vested except in accordance with the plan." 438 U.S. at 245-46, 98 S.Ct. at 2723. Hess' expectation that its contracts of employment with its borrowed employees, albeit implied, were covered under the Workmen's Compensation Act was not unreasonable. The retroactive application provision, by completely destroying this

expectation, represents a substantial impairment of Hess' contractual expectations, and we must therefore proceed with the remainder of the three-step analysis set forth in *Energy Reserves*.

C. Public Purpose and the Adjustment of Rights

[6] A finding that there has been an impairment "is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution." *United States Trust*, 431 U.S. at 21, 97 S.Ct. at 1517. That determination will depend on whether the statute can be justified on the basis of a significant and legitimate public purpose that reasonably accommodates the rights and responsibilities of the contracting parties. *Id.* at 22, 97 S.Ct. at 1517.

The Virgin Islands legislature's explanation for the 1986 bill abolishing the borrowed employee doctrine and applying that abolition to pending claims states that the bill is needed "to assist persons who are injured while on the job and to assist the Department of Labor Workmen's Compensation Division, in recouping monies it has expended on injured workmen from the wrongdoer." Bill No. 498, 16th Legislature (1986) (attached explanation), Nieves App. at 151.

The district court concluded that "[p]rotection of workmen's compensation resources as well as protection of Virgin Islands' workers are both significant and legitimate public purposes." *Prevost*, 640 F.Supp. at 1224. We do not understand Hess to dispute the district court's conclusion that elimination of the borrowed employee doctrine serves a legitimate public purpose. Instead, Hess limits its argument to the contention that there is no valid public purpose served by the retroactive application provision because this provision was special interest legislation aimed against Hess. In *Energy Reserves*, the Court explained that, "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." 459 U.S. at 412, 103 S.Ct. at 705.

For purposes of the present case, we can consider the public purpose factor together with the final step in the Contract Clause analysis which requires the court to address whether the legislation is based upon "reasonable conditions and [is] of a character appropriate to the public purpose justifying its adoption." *United States Trust*, 431 U.S. at 22, 97 S.Ct. at 1518. Framed another way, this inquiry entails an "overall determination of reasonableness." *Id.* at 22 n. 19, 97 S.Ct. at 1518 n. 19.

[7] Courts are required to defer to the legislature's judgment concerning the necessity and reasonableness of economic and social legislation. *Id.* at 22-23, 97 S.Ct. at 1517-18. The district court believed that the retroactive application provision was reasonable because it viewed the borrowed employee doctrine as having been adopted with the *Vanterpool* decision in 1985 and it construed the amendment as conforming Virgin Islands law "with workmen's compensation practice prior to *Vanterpool.*" 640 F.Supp. at 1224-25. Hess argues that the district court applied too deferential a standard and that the retroactive application provision is unreasonable under any standard.

[8] When the state is a contracting party, the legislative judgment is subject to stricter scrutiny than when the legislation affects only private contracts. *United States Trust*, 431 U.S. at 25-26, 97 S.Ct. at 1519-1520. Hess recognizes that the contracts at issue are between private parties, but argues that because recoupment benefits the Virgin Islands government, it is the Government's self-interest which is at stake, and the stricter scrutiny is appropriate.

[9] We are not convinced that heightened scrutiny is appropriate in this case. The workmen's compensation fund appears to be independent from other Virgin Islands funds. Funds recouped when a beneficiary recovers in a third-party tort action are not deposited in the Virgin Islands general treasury but go to replenish the fund for payment of future workmen's compensation benefits. *See* 24 V.I.C. 263, 265, 266. Moreover, in *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d at 717-18, we held that a more exacting inquiry was not

required of legislation requiring miners to protect surface owners from subsidence damage notwithstanding waivers. The fact that one of the asserted purposes of the statute was "preserving the state's limited tax base" did not require treating the state as a contracting party. *Id.* at 718. The state's self-interest in its tax base is not dissimilar to its interest in preservation of the workmen's compensation fund. Accordingly, we will apply the deferential standard of review to make the requisite "overall determination of reasonableness."

[10] In a due process context, the Supreme Court stated, "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justification for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (1976). The same point is apt when considering the rationality of retroactive application of a statute for purposes of the Contract Clause. Legislation aimed retroactively to benefit or burden a few identifiable persons is particularly vulnerable to the charge that it is not reasonably related to the asserted public purposes.

In striking down the retroactive application of a Minnesota pension fund requirement in *Allied Structural Steel*, the Court stressed that the legislative history indicated that the statute had an "extremely narrow focus." 438 U.S. at 248, 98 S.Ct. at 2724. Moreover, the statute was drafted so that "its narrow aim was leveled, not at every Minnesota employer, not even at every Minnesota employer who left the State, but only at those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees." *Id.* at 250, 98 S.Ct. at 2725. These factors contributed to the Court's decision that the statute "can hardly be characterized . . . as one enacted to protect a broad societal interest rather than a narrow class." *Id.* at 248-49, 98 S.Ct. at 2724.

Here, as in *Allied Structural Steel*, the legislative history indicates that the legislature was aware that the major impact of the retroactive application provision would be on Hess. The

official explanation appended by the legislature to the amendment states:

> Take a situation where a Litwin employee is injured at Hess. Under the present law, the Courts say our Legislature intended not only to grant immunity to the injured worker's employer Litwin, but also to Hess. The bill would avoid that.

Bill No. 498, 16th legislature (1986) (attached explanation), Nieves App. at 151. Since Hess is the largest private employer in the Virgin Islands, the illustration alone might not suggest special legislation except that the legislative history also demonstrates that the legislature expressly sought to overturn application of the borrowed employee doctrine to the six cases pending against Hess.[10] Since the retroactive application provision was designed to abolish Hess' tort immunity on behalf of those six plaintiffs,[11] it can hardly be viewed as general legislation for the public welfare.

The legislature's aim directed to the pending plaintiffs' cases against Hess distinguishes this case from *Energy Reserves Group*, where the Court rejected a claim that retroactive legislation which applied only to a few major utility companies

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10. For example, one of the principal sponsors of the bill explained it as follows:

    The "borrowed servant" doctrine was abolished by the Fifteenth Legislature. But now the court is saying that there is an additional type of employee called a "statutory employee." So that the Litwin employee is now being construed to be an employee of Hess. And that, as a matter of law, now is preventing the Litwin employee from suing Hess for negligence caused by a Hess employee. Transcript, Regular Session, 16th Legislature (Jan. 23, 1986) (statement of Senator Hodge), Nieves App. at 158.

    Another reference also makes it clear that the legislature intended the retroactive application provision to enable "the Division of Workmen's Compensation . . . to recoup monies that it has expended on behalf of the injured employee from the party in this case, Hess, whose negligence caused the injury or injuries" *Id.*

11. At oral argument, counsel referred to one other similar pending case against Martin Marietta, and were aware of no other case raising the same issue.

was special interest legislation similar to that in *Allied Structural Steel:*

> Given the nature of the industry—sales to public utilities—it is impossible for any regulation not to have a major effect on a small number of participants. This differs from the statute under challenge in *Allied Structural Steel Co.*, where a small number of employers were singled out from the larger group.

459 U.S. at 417 n. 25, 103 S.Ct. at 708 n. 25.

It also distinguishes the Fifth Circuit's decision in *Louviere v. Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985), relied on heavily by the employees. The court in *Louviere* was interpreting a 1984 congressional amendment of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, which was designed to overturn the Supreme Court decision in *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984), interpreting that Act as making contractors who secured statutory compensation for employees of subcontractors immune from tort actions brought by those employees. The amendment repudiating such immunity was made retroactively applicable to all pending claims in order to allow all pending third-party suits to proceed under what Congress believed to be the proper interpretation of the Act.

In upholding the application of the amendment to pending cases against a due process challenge, the Fifth Circuit, in summary reasoning, relied only on the principle enunciated in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801), that a change in law while a case is on direct review is to be given effect. *Louviere*, 755 F.2d at 430. *Louviere* did not present a Contract Clause issue, since that clause is not applicable to the federal government, and therefore cannot govern the issue before us because of the significant distinction the Supreme Court has made between Contract Clause cases and substantive due process cases. In *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 104

S.Ct. 2709, 81 L.Ed.2d 601 (1984), the Court contrasted the "limitations imposed on States by the Contract Clause with the *less searching* standards imposed on economic legislation by the Due Process Clauses." *Id.* at 733, 104 S.Ct. at 2720 (emphasis added). *See also id.* at 727 n. 6, 104 S.Ct. at 2716 n. 6.

Furthermore, cases applying the *Schooner Peggy* principle have specifically recognized that a change in law will not be applied to pending cases when such retroactive application produces "substantial inequitable results." For example, this court in *Mineo v. Port Authority of New York & New Jersey,* 779 F.2d 939, 943-46 (3d Cir. 1985), *cert. denied,*—U.S.—, 106 S.Ct. 3297, 92 L.Ed.2d 712 (1986), refused to retroactively apply the overtime provisions of the Fair Labor Standards Act to employees engaged in the business of mass transit notwithstanding the Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), holding those employees were subject to the FLSA. We stated, "Inasmuch as the Port Authority encountered an unresolved issue of law, on which it took a reasonable position, retroactive application of *Garcia* to foreclose its reliance on *National League of Cities* [*v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976)] is not equitable." 779 F.2d at 946. Although the facts in this case are different, the principle that the *Schooner Peggy* line of cases will not be applied to cause "substantial inequitable results" is equally applicable.

[11] This case, unlike *Louviere,* concerns legislative enactment of special interest legislation.[12] That purpose is apparent not only from the narrow aim evidenced in the legislative history discussed above, but also from the fact that the 1984 amendment to the Virgin Islands Workmen's Compensation Act had already effected the abolition of the borrwed employee doctrine on a prospective basis. In *Allied Structural Steel,* the

12. Although there are cases that suggest that a legislature's attempt to correct what it deems to be an erroneous judicial interpretation may justify a retroactive application of the curative legislation, nothing in these cases requires upholding retroactive application of curative legislation when retroactivity produces arbitary and capricious results.

Court stressed that the effective life of the state's pension legislation was extremely short because the problem addressed was treated in the pending ERISA legislation. 438 U.S. at 248-49 n. 21, 98 S.Ct. at 2724 n. 21. Here, the 1984 enactment of section 263a abolishing the borrowed employee doctrine in workmen's compensation cases satisfied the legislature's enunciated aim of protecting Virgin Islands' workers. As in *Allied Structural Steel,* there was no general welfare to be served by the 1986 retroactive application provision which could affect at most six or seven pending cases. Thus, this legislation "can hardly be characterized . . . as [a law] enacted to protect a broad societal interest rather than a narrow class." *Id.* at 248-49, 98 S.Ct. at 2724.

Similarly, the retroactive application provision cannot be justified by the goal of recouping expenditures made by the workmen's compensation fund. Because we are not applying heightened scrutiny we do not rely on the fact, stressed by Hess, that there is already a statutory vehicle by which the fund may increase premiums of employers by up to 25 percent whenever claims chargeable to that employer exceed its premium payments, 24 V.I.C. 271(b)(4), which could presumably be applied to Litwin and passed through to Hess by it. Even under the deferential standard, if recouping past expenditures could justify a retroactively established cause of action the circumscription of the Contract Clause would be rendered practically meaningless. Almost any arrangement would then be subject to impairment in order to benefit a potentially faltering or floundering fund. While the need to keep the workmen's compensation fund on a sound financial basis may justify prospective legislation designed for that purpose, it cannot justify this type of retrospective legislation. In sum, after examining the asserted purposes of the retroactive application provision and the means chosen to accomplish them, we believe that this provision violates the Contract Clause.

III.

Questions of Fact

We have concluded that the district court did not err as a matter of law in holding that the borrowed employee doctrine was applicable in the *Nieves, Taylor, Thomas* and *Cotto* actions. Three of the injured employees, Nieves, Taylor and Cotto, contend that in any event the grant of summary judgment to Hess was inappropriate because there were questions of fact as to their status as borrowed employees.

Under *Vanterpool,* in order to be considered a borrowed employee, the employee:

> must have consented to an express or implied contract of *hire* with the borrowing employer. Moreover, a borrowed employee's special employment must have been of a nature and of sufficient duration so that the employee may be presumed to have evaluated and acquiesced in the risks of his new employment.

766 F.2d at 128 (emphasis in origination).

[12] The district court granted summary judgment against Nieves (1) because his consent to a contract of hire was evidenced by the "rehire" form (also referred to as the "Hess loanee" form) signed by Nieves stating that he would work as a Hess loanee under Hess' control, direction and supervision, *Nieves v. Hess Oil Virgin Islands Corp.*, No. 84-336, slip op. at 4 (D.V.I. Nov. 1, 1985), Nieves App. at 177, *see* p. *infra* and (2) because Nieves' work at the Hess refinery for three months "provided him with ample opportunity to evaluate the risks of his employment." *Id.* at 5, Nieves App. at 178. This decision is consistent with *Vanterpool,* 766 F.2d at 127. Nieves contends that because he took instruction from an employee who, unknown to him, was actually also a Litwin loanee, there was an issue of fact as to whose employee he was at the relevant time. He conceded that this intermediary was working under the Hess superintendent. Nieves App. at 119-120. This

contention was also considered and rejected in *Vanterpool*, where we stated, "It is undisputed that, at the time of his injury, Vanterpool was performing [Hess'] work, on [Hess'] property, and with the use of [Hess] equipment." 766 F.2d at 121 n. 3.

Nieves also contends that his signature on the loanee form dated June 27, 1983, Nieves App. at 61, was a forgery. The district court held that this failed to create an issue of fact because the signature on the loanee form "is remarkably similar to the signatures of the plaintiff that appear on numerous exhibits attached to his opposition to the motion for summary judgment". *Nieves*, slip op. at 2-3, Nieves App. at 175-76. Under *Anderson v. Liberty Lobby, Inc.*,—U.S.—, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986), the court on a motion for summary judgment can decide whether the evidence "is so one-sided that one party must prevail as a matter of law." In addition to the similarity in signatures, the documents before the district court were admittedly executed by Nieves in connection with his employment on the same date as appears on the rehire form. On this record, the district court did not err in finding that Nieves' bald allegation of a forgery did not raise a genuine issue of material fact sufficient to preclude summary judgment.

[13] Taylor does not challenge his signature on the Hess loanee form. Taylor had ample opportunity to evaluate the risks of his employment at Hess when he worked at Hess as a Litwin Type I employee on the prior occasions performing similar tasks. *Taylor v. Hess Oil Virgin Islands Corp.*, No. 84-205, slip op. at 6 (D.V.I. Sep. 18, 1985), Taylor App. at 142. Taylor's challenge to summary judgment against him is limited to his argument that he cannot be considered a borrowed employee because he was not performing Type I work at the time of his injury, but was instead performing new construction under supervision of a Litwin supervisor. As in the *Nieves* case, the interposition of a Litwin intermediary when a Hess supervisor was in control does not signify that Hess was not the employer. We agree with the district court that the particular work performed by Taylor is not a determinant factor in deciding whether he was a borrowed employee. *Taylor*, slip op.

at 4-5, Taylor App. at 140-41. Since the record supports the district court's determination that the *Vanterpool* test was met as to Taylor, summary judgment was appropriate.

[14] To the extent that Cotto challenges summary judgment on the same ground as Taylor, the same considerations apply. Cotto raises an additional contention. He argues that he could not consent to the loanee form because he was illiterate and could not read English. The district court held that notwithstanding Cotto's illiteracy, he is bound to the legal consequences of signing the form. *Cotto v. Hess Oil Virgin Islands Corp.*, No. 84-318, slip op. at 6 (D.V.I. Nov. 1, 1985), Cotto App. at 134. Moreover, the court stated that "even assuming arguendo that Cotto did not give his express consent to work as the borrowed employee of HOVIC, his repeated rehirings at a Litwin Type I employee indicates implied consent to work for the borrowing employer." *Id.*, Cotto App. at 134. We agree. In light of the record which supports the district court's conclusion that there was no genuine issue of fact that Cotto was a borrowed employee, summary judgment was appropriate.

IV.

Conclusion

For the reasons set forth above, we will affirm the district court's grant of summary judgment to Hess in the *Nieves, Cotto, Taylor,* and *Thomas* cases. In *Prevost* and *Scotland,* although the district court denied summary judgment for reasons that we cannot affirm, it did not address the factual issue of the status of those plaintiffs as borrowed employees. Therefore, we will remand those cases for further proceedings in accord with this opinion.

STAPLETON, Circuit Judge, dissenting.

The court concludes that a prior version of the Virgin Islands Workmen's Compensation Act, as interpreted by this

court, became an implied term of an implied employment contract subject to contract clause protection and that the Virgin Islands legislature is barred by the contract clause from amending the Act to retroactively correct what it perceived to be an erroneous interpretation of that statute. I respectfully dissent because the corrective amendment did not impair any contract-based expectation and because, even if that amendment could be said to impair such an expectation, it did not do so in violation of the contract clause.

I.

As correctly noted by the court, the Supreme Court has established a three-step analysis for determining whether retroactive state legislation constitutes an impermissible impairment of contractual rights. *Energy Reserve Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). The first step requires that two questions be answered: Does the plaintiff have contract-based rights and have those rights been substantially impaired? *Id.* at 411, 103 S.Ct. at 764. Only if both of these questions are answered in the affirmative does a court proceed in the second step to inquire whether the legislation occasioning the substantial impairment has a "legitimate public purpose." *Id.* Finally, the court determines whether the impairment is reasonable and "appropriate to the public purpose" of the legislation. *Id.* at 412, 103 S.Ct. at 705.

A. The Absence of a Contract Right.

The "purpose of the [Contract] Clause [is] clear: to encourage trade and credit by promoting confidence in the stability of contractual obligations." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 15, 97 S.Ct. 1505, 1514, L.Ed.2d 92 (1977). Its "primary focus [is] upon legislation . . . designed to repudiate or adjust pre-existing debtor-credit or relationships that obligors [are] unable to satisfy." *Keystone Bituminous Coal Association v. DeBenedictis*,—U.S.—, 107 S.Ct. 1232, 1251, 94 L.Ed.2d 472 (1987). Given that focus, it is not

surprising that the Supreme Court has stated that the "term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do certain acts. Mutual assent to its terms is of its very essence." *Louisiana ex rel. Folsom v. Mayor of New Orleans,* 109 U.S. 285, 288, 3 S.Ct. 211, 213, 27 L.Ed. 936 (1883); *accord Crane v. Hahlo,* 258 U.S. 142, 146, 42 S.Ct. 214, 215, 66 L.Ed. 514 (1922); *Morley v. Lake Shore Railway Co.,* 146 U.S. 162, 169, 13 S.Ct. 54, 57, 36 L.Ed. 925 (1892); *see* Hale, *The Supreme Court and the Contract Clause: II,* 57 Harv.L.Rev. 621, 621-28 (1944).

Contract clause cases have focused upon laws alleged to impair consensually assumed contractual obligations. *See, e.g., Keystone Bituminous Coal Association v. DeBenedictis,* —U.S.—, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (law affecting express private contracts); *Exxon Corp. v. Eagerton,* 462 U.S. 176, 103 S.Ct. 2296, 76 L.Ed.2d 497 (1983) (same); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (same); *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978) (same); *United States Trust Co. v. New Jersey,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (law affacting express contract between bondholders and state). In contrast, Hess in this case urges that we employ the contract clause to strike down a law altering a nonconsensual regulation imposed pursuant to the police power of the state. I would decline to do so.

Although courts in some contexts have invoked a legal fiction that contracting parties incorporate certain kinds of statutory law in their contract, to indulge in that fiction in the context of contract clause analysis as my colleagues have done requires extension of contract clause protection far beyond the limits that the Supreme Court has prescribed. In *Louisiana ex rel. Folsom v. Mayor of New Orleans,* 109 U.S. 285, 3 S.Ct. 211, 27 L.Ed. 936 (1883), that Court refused to sanction the use of a

similar legal fiction to extend contract clause protection beyond expectations based on mutual assent:

> A judgment for damages, estimated in money, is sometimes called by text writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and any a fiction of law, a promise to pay is implied where such legal obligation exists. But this fiction cannot convert a transaction wanting the assent of the parties into one which necessarily implies it. The prohibition of the federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the prohibition.

Id. at 288, 3 S.Ct. at 213.

In light of the purpose of the contract clause, the better-reasoned cases hold that workers' compensation laws are simply state regulation of the employment relationship. Representative of these cases, *McAllister v. Board of Education*, 79 N. J. Super. 249, 191 A.2d 212 (1963), *aff'd*, 42 N. J. 56, 198 A.2d 765 (1964) in which the court reasoned:

> Although the rights and liabilities of employer and employee under the Workmen's Compensation Act have been called "contractual in nature" and "a definite statutory status or relationship which is in essence contractual," they are not truly contractural. The courts have used the term "contract" in workmen's compensation cases much as they have used that term when speaking of marriage "contracts." In employment, like marriage, the parties must agree to enter the relationship, but once they do, the law dictates to them their rights and liabilities.
>
> The net result of all this is that the workmen's compensation "contract" includes everything that the Legislature and the courts say it shall include, whether added before or after the injury.

Id. 191 A.2d at 217-18 (citations omitted); *accord Price v. All American Engineering Co.*, 320 A.2d 336, 339 (Del.1974);

cases cited by the court at 1245 n. 4. *Cudahy Packing Co. v. Parramore,* 263 U.S. 418, 44 S.Ct. 153, 68 L.Ed. 366 (1923), albeit not a contract clause case, lends support to this view of workmen's compensation laws. In that case, the Supreme Court recognized:

> Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract. . . . The liability is based, not upon any act or omission of the employer but upon the existence of the relationship which the employee bears to the employment.

Id. at 423, 44 S.Ct. at 154.

If a workers' compensation statute is held to qualify for contract clause protection despite the absence of expectations based on "mutual assent," *Louisiana ex rel. Folsom,* 109 U.S. at 288, 3 S.Ct. at 213, the same must be said for state legislation concerning workplace safety, equal employment opportunity, unemployment insurance, maximum working hours, and the like. Yet, I find nothing in 200 years of Supreme Court caselaw that remotely suggests that the contract clause was intended to restrict legislative discretion regarding public policy in these areas. Similarly, I find no warrant for restricting legislative discretion concerning the way in which victims of employment-related torts will be compensated.

Although the court's opinion initially acknowledged that a successful contract clause challenge must be predicated on "contractual rights or obligations altered by the law," p. 1243, the court ultimately fails to identify any expectation of Hess based on the mutual asset of Hess and its borrowed employees. For this reason, I find the court's opinion unpersuasive.

The court first relies upon *United States Trust Co. v. New Jersey,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977), and *Mississippi ex rel. Robertson v. Miller,* 276 U.S. 174, 48 S.Ct. 266, 72 L.Ed. 517 (1928), for the proposition that the contract clause reaches "terms implied in a contract" and "implied contracts as well." p. 1244. *United States Trust Co.* held that New Jersey and New York could not repeal a covenant in the bonds of the Port Authority of New York restricting the ability

of the Authority to subsidize rail transportation from revenues pledged to secure those bonds. No implied terms were involved. The import of the footnote quoted by my colleagues is that, in the words of the Supreme Court, "statues *governing the interpretation* and *enforcement of contracts* may be regarded as forming part of the obligation of contracts made under their aegis." 431 U.S. at 17 n. 14, 97 S.Ct. at 1515 n. 14 (emphasis supplied). It is one thing to extend contract clause protection to legislation governing the interpretation and enforcement of contracts in effect at the time the contract is formed. Such laws are undoubtedly relied upon by the parties when they contract. It is very different to extend contract clause protection to rights conferred by social legislation and the Supreme Court has not done so.

It should also be noted that the "incorporation rationale" in *United States Trust Co.* would not support the theory advanced by Hess and adopted by the court even if it were not limited to laws governing the interpretation and enforcement of contracts. The incorporation rationale, being grounded in the expectations of contracting parties, applies only to laws in effect *when the contract is made. See United States Trust Co.*, 431 U.S. at 19 n. 17, 97 S.Ct. at 1516 n. 17. As I understand it, Hess concedes that a state legislature may make a new workers' compensation law or an amendment to an existing one applicable to employment contracts entered into before its enactment so long as the amendment comes before an employee is injured. Hess could not successfully argue otherwise. As the Supreme Court observed in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S.Ct. 2296, 76 L.Ed.2d 497 (1983):

> The Contract Clause does not deprive the States of their "broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *United States Trust Co. v. New Jersey*, [431 U.S. 1, 22, 97 S.Ct. 1505, 1517, 52 L.Ed.2d 92 (1977)]. As Justice Holmes put it: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter." *Hudson*

> *Co. v. McCarter*, 209 U.S. 349, 357 [28 S.Ct. 529, 531, 52 L.Ed. 828] (1908). Thus, . . . a workmen's compensation law may be applied to employers and employees operating under pre-existing contracts of employment that made no provision for work-related injuries, *New York Central R. Co. v. White*, 243 U.S. 188 [37 S.Ct. 247, 61 L.Ed. 667] (1917).

Id. at 190, 103 S.Ct. at 2305 (footnotes omitted). Hess's argument is not that it had the right to expect tort immunity based on the workers' compensation law in effect at the time of contracting, but rather that the workers' compensation law became immutable, and Hess's immunity thereunder vested, *at the time of injury*. This highlights the fact that Hess's expectation was not *contract-based*. Rather, its theory is that its statute-based right of tort immunity somehow became vested at the time of injury.

Although *Mississippi ex rel. Robertson* uses the phrase "implied contract," the Court did not there extend contract clause protection to a situation lacking expectations based on mutual assent. This is apparent from that portion of the opinion immediately following the portion quoted by the court:

> The selection of plaintiff to be the Revenue Agent amounted to a request or direction by the State that he exert the authority and discharge all the duties of that office. In the performance of services so required of him plaintiff made the investigations and brought the suit to discover and collect the delinquent taxes. Under the statutes then in force as construed by the highest court of the State, he thereupon became entitled to the specified percentages of the amounts subsequently collected on account of the taxes sued for. The retroactive application of c. 170 would take from him a part of the amount that he had theretofore earned. That would impair the obligation of the implied contract under which he became entitled to the commissions.

276 U.S. at 179, 48 S.Ct. at 268. Accordingly, the holding of *Mississippi ex rel. Robertson* is that the contract clause protects a unilateral contract once it has been consummated through performance by the promisee.

The court's decision does not rest on these venerable precedents, however. Rather, in making its "determination as to whether waiver of tort remedies [by the borrowed employees] is a term of the contract," the court looks "to the expectations of the parties to the contract rather than to any formalistic classification." P. 1243. This puts the cart before the horse. Although it makes sense to look to the contract-based expectations of the parties to determine whether there has been a substantial impairment of a contractual relationship, expectations do not necessarily evidence a contractual relationship. Life engenders many expectations; the contract clause protects only expectations arising from mutual assent.

The court's failure to focus on the necessity of mutual assent causes it to virtually ignore the implied contract between Hess and the borrowed employees. Its discussion of the expectations of the parties focuses almost solely on the agreement between Hess and Litwin.[1] Because the borrowed employees did not give their assent to that contract, Hess's expectations in entering it are irrelevant to the question of whether the contract clause applies in this situation.

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1. Although it is irrelevant whether Hess pays for the borrowed employees' workers' compensation insurance, Hess pays only in the sense that Litwin undoubtedly uses revenues received from Hess to pay the insurance premiums, just as it undoubtedly uses revenues from Hess to pay the salaries of the employees, unemployment compensation premiums, and the like. The Weinman affidavit evidences no more than that Litwin had a "cost plus profit" contract with Hess. As we noted in the *Vanterpool* case,

> Borrowed employees, such as Vanterpool, who was borrowed by [Hess] from Litwin, remained on the Litwin payroll and Litwin made insurance premium payments to the statutory workers' compensation fund. *See* app. at 31. [Hess] in turn, reimbursed Litwin for all payroll expenses incurred for borrowed employees, including workers' compensation premiums. *See* app. at 104 (affidavit of Edward L. Weinman, Controller of [Hess]). This reimbursement was made by including the cost of procuring workers' compensation insurance as a factor in the scheduled time and materials rate paid to Litwin for borrowed employees. *Id.*
>
> *Vanterpool v. Hess Oil Virgin Islands Corp.*, 766 F.2d 117, 120 (3d Cir. 1985), *cert. denied*,—U.S.—, 106 S.Ct. 801, 88 L.Ed.2d 777 (1986).

More importantly, however, any relevant expectations of Hess were based neither on its contract with Litwin nor on its implied contract with the borrowed employees. To the extent Hess had any expectations of immunity from tort liability to its borrowed employees when it initiated its arrangement with Litwin and borrowed the plaintiff employees, that expectation could only have arisen from a hope that it would be able to persuade the courts to adopt an interpretation of the Virgin Islands Act that they had given no indication they were prepared to embrace. This is simply not the kind of expectation the contract clause was intended to protect.

In the final analysis, the court's conclusion is based on the assertion that "the concept that borrowed employees consent to a waiver of employer tort liability as a term of the implied contract of employment was the basis of the *Vanterpool* opinion, and is binding on us here." P. 1246. There is no little irony in this conclusion. In *Vanterpool*, we reversed the district court's holding that a borrowed employee could not be stripped of his common law rights against his borrowing employer without a showing that he had given knowing assent to a waiver of those rights. Although we noted that there was an "implied contract" of employment between a borrowed employee and a borrowing employer for purposes of applying the Virgin Islands Act, we expressly held that the waiver of tort liability came about by operation of the statute and not as a result of the borrowed employee's assent to its inclusion in the implied contract of employment:

> Because the foundation of workers' compensation rests on the contract for *hire*, the threshold inquiry must be whether the employee made such a contract with the borrowing employer . . . This inquiry, however, is different from whether the employee consented to accept the compensation scheme as well. As previously noted, where the scheme is mandatory, it conditions all employment. The borrowed employee may or may not make an express or implied contract for hire with a borrowing employer, but once such a contract is made, there is no secondary inquiry

as to whether the employee consents to the application of the compensation scheme itself.

766 F.2d at 126.

Workers' compensation is wholly a creature of statute, not contract. For this reason, neither Hess nor the court is able to identify a contract right that is impaired by the challenged amendment. Accordingly, Hess should not prevail.

B. The Absence of Substantial Impairment

Assuming nonetheless that the pre-1984 version of the Virgin Islands Act was a protected implied term of the implied employment contract between Hess and its borrowed employees, application of the amended Act to all claims pending on or filed after the effective date of the challenged amendment does not violate the contract clause. Hess bears the burden of demonstrating that the amendment "substantially impaired" its contractual rights or obligations. *Cf. National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 472, 105 S.Ct. 1441, 1455, 84 L.Ed.2d 432 (1985). "Minimal alteration of contractual obligations may end the inquiry at its first stage" *Allied Structural Steel Co.*, 438 U.S. at 245, 98 S.Ct. at 2723. The severity of impairment is measured by the law's effect on the legitimate expectations and reliance interests of the contracting parties. *Id.; Energy Reserves Group*, 459 U.S. at 411, 103 S.Ct. at 704; *United States Trust Co.*, 431 U.S. at 20 n. 17, 97 S.Ct. at 1516 n. 17. "In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves Group*, 459 U.S. at 411, 103 S.Ct. at 704.

When we focus upon Hess's legitimate expectations, it is important to remember that the Virgin Islands Act, even if conceived as being incorporated into every employment contract, nevertheless exists solely by virtue of legislation adopted by the Virgin Islands legislature. I believe Hess can have had no legitimate expectation that the statutory scheme at any given point in time would remain unchanged, and, accordingly, would hold, in the alternative, that there has been no substantial impairment of a legitimate expectation.

The court candidly acknowledges that Hess could not reasonably expect the Act to remain unchanged. It asserts, however, that "Hess had no reason to anticipate that the legislature could make such a drastic change as retroactive elimination of [its] coverage under the Act as the employer of borrowed employees." P. 1248. I do not agree that Hess had a legitimate expectation of being free from retroactive change.

Hess negotiated its contract with Litwin in 1977. That contract was last amended in 1980. The latest accident which is the subject of these suits occurred on May 31, 1984. As of that date, there was some reason to believe that the borrowed employee doctrine did not apply in the Virgin Islands.[2] There was no case adopting that doctrine for the Virgin Islands and no case providing a basis for predicting that it would be adopted. The most that can be said is that the issue was an open one when these accidents occurred. Accordingly, whichever assumption Hess made about this issue when it planned its affairs during the period before the district court decision in *Vanterpool* on June 7, 1984, it had to expect that a *court* might decide the other way and, in the normal course, apply its ruling to accidents which had previously occurred.

In addition, Hess knew that it faced the possibility of retroactive *legislative action.* Whichever way the court decision went, Hess knew that the Virgin Islands legislature could have the last word. Not only did Hess know that the legislature had periodically amended the Act in the past, it had specific reason to know that the legislature had not hesitated to revise the Act retroactively to cure a judicial interpretation of the Act with which it disagreed. In response to a Third Circuit interpretation of the Act's provision governing liability of third party tortfeasors that shortened the generally applicable two-year statute of limitations, *see Berkeley v. West Indies Enterprises, Inc.,* 480 F.2d 1088 (3d Cir. 1973), the Virgin Islands legislature

2. The Virgin Islands Act was based on Puerto Rico's workers' compensation law, which had been interpreted by the First Circuit in *Colon Nunez v. Horn-Linie,* 423 F.2d 952 (1st Cir.1970), to permit suits by borrowed employees against their borrowing employers. *See Vanterpool,* 766 F.2d at 124 & n. 10.

amended the provision to retroactively apply a two-year standard. In *Galvan v. Hess Oil Virgin Island Corp.*, 549 F.2d 281 (3d. Cir. 1977), this court upheld the retroactivity of that change without discussion. *Id.* at 286.

Because the concept of giving contract clause protection to statutory rights unrelated to the interpretation and enforcement of contracts is a novel one, there are few cases that address the issue of whether "legitimate expectations" in contract clause analysis must include the possibility of statutory amendments. This court recently addressed that issue, however, after suggesting that legislatively created rights are not protected by the contract clause. In terms of the absence of both substantial impairment and contract-based expectations, I find Hess's present position comparable to, but less sympathetic than, the landlord in *Troy Ltd. v Renna*, 727 F.2d 287 (3d Cir.1984). In that case, New Jersey's Anti-Eviction Act, enacted in 1974, created a grace period which in effect extended the term of a tenant's lease when the landlord failed to renew because of plans to convert to condominiums. In 1981, the New Jersey legislature enacted the Tenancy Act to enhance the protection of certain senior citizens and disabled persons against evictions resulting from condominium conversions. The effect of qualifying for a "protected tenancy" under the Act was to obtain the right to remain as a tenant in a converted unit for up to 40 years beyond any period already authorized by the Anti-Eviction Act. The Tenancy Act also limited the magnitude of rent increases during the "protected tenancy." The Act conferred discretion on New Jersey courts to apply its provisions to buildings that were converted before the effective date of the Act.

Even though the Act authorized retroactive modification of the rights of parties to lease contracts, this court sustained its validity. In doing so, we noted the absence of contract-based expectations as well as the lack of substantial impairment to *legitimate* expectations:

> [I]t is doubtful that *any* impairment of a contractual relationship has occurred. The Tenancy Act only enlarged, for senior citizens and the disabled, a preexisting statutory

> tenancy which came into operation as a matter of law. Prior to the enactment of the Tenancy Act, New Jersey had already placed significant limitations upon the rights of owners of multiple dwellings to define the landlord-tenant relationship solely in terms of contract . . . . Thus, beginning in 1974 the terms of the landlord-tenant relationship were specified to a large extent by statute. The Tenancy Act only operates to protect those statutory tenants whose relationship with their landlord has already become non-consensual by virtue of the Anti-Eviction Act. That is, the Tenancy Act simply enlarges the terms of a statutory tenancy already created by the Anti-Eviction Act. All of the plaintiffs acquired their interests in the Springfield complex after the Anti-Eviction Act went into effect. Such an enlargement of an already-regulated statutory tenancy is probably not an impairment at all. As the Supreme Court held in *Veix v. Sixth Ward Building & Loan Ass'n.*, 310 U.S. 32, 38 [60 S.Ct. 792, 794, 84 L.Ed. 1061], . . . (1940), "[w]hen he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic."

727 F.2d at 297.

In *Troy,* we distinguished *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978), relied upon here by the court, based on a similar analysis:

> *Spannaus* deals with the modification of an existing contractual relationship voluntarily arrived at by negotiation between employer and employee. The Tenancy Act, in contrast, involves the modification of the terms of a non-contractual statutory tenancy previously imposed by state law. In *Spannaus,* the Minnesota legislature entered a field it had never before sought to regulate; New Jersey, to the contrary, regulated statutory tenancies following the

> expiration of a contractual lease beginning in 1974, and the plaintiffs purchased subject to those limitations. . . .

727 F.2d at 299.

Here, similarly, any tort immunity Hess had was solely a matter of statute and the challenged amendment to that statute did not frustrate any legitimate expectation of Hess that it could count on such immunity remaining unaltered by the legislature.

C. Public Purpose and Reasonableness

The official explanation attached to the challenged amendment states in substantial part:

> This bill is needed to assist person [sic] who are injured while on the job and to assist the Department of Labor Workmen's Compensation Division, in recouping monies it has expended on injured workmen from the wrongdoer.
>
> This need arises because the courts have been interpreting Section 284 of Title 24 of the Workmen's Compensation Act to grant immunity not only to a worker's immediate employer, but also to secondary employers although the Legislature never intended immunity for these secondary wrongdoers.
>
> Other courts have made this bad interpretation, but it was quickly cured by other legislatures. Last June in *Washington Metro Area Transit v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984) the United States Supreme Court interpreted the Federal Workmen's Compensation Act (LSHW) [sic] in such a manner as to grant immunity not only to an employee's immediate employer but to a remote secondary employer. The Congress became aware immediately of this wrong interpretation of its Act and within ninety days Congress amended the Federal Workmen's Compensation Act to avoid this interpretation.
>
> This bill uses the same language Congress used when amending its Act. . .

By this proposed bill this defect can be cured.

Take a situtation where a Litwin employee is injured at Hess. Under the present law, the Courts say our Legislature intended not only to grant immunity to the injured worker's employer Litwin, but also to Hess. The Bill would avoid that.

This is important not only to the injured workers, but to the Department of Labor because under the bill, for example, if the Litwin employee is badly hurt as a result of the negligence of Hess, and the employee has collected $25,000.00 in workmen's compensation benefits, if he can sue Hess for his injury, the first $25,000.00 of his recovery is paid back to Workmen's Compensation. This has enabled the Department of Labor in the past to maintain its ability to pay claims without undue assistance from the General Fund. The present existing interpretation would cut off that needed supply of revenue.

Bill No. 498, 16th Legislature (1986) (attached explanation), Nieves App. at 151-52.

The Virgin Islands legislature here articulates three public purposes that support retroactive application of the amendment; to cure *Vanterpool's* adoption of the borrowed employee doctrine so as not to exclude any of the intended beneficiaries of the right to sue borrowing employers; to assist injured workers; and to assist the Commissioner of Labor in recouping sums paid to workers injured by third party tortfeasors. Although I believe each of these public purposes would suffer as a basis for sustaining the amendment we need address only one.

The court expressly concedes that there is a public purpose to prospective abrogation of borrowing employer immunity. As it correctly notes, the theory of the Act is that an employee surrenders his or her common law right to sue his or her employer in tort in exchange for the more certain, though more limited, remedy provided by the Act. As indicated in the above-quoted explanation, the original intent of the Virgin

Islands legislature was to effect this exchange between the employee and his or her *immediate employer,* but not to require the employee to surrender his or her common law right against a *second employer* when he or she would receive no additional consideration from anyone for that surrender. Although one can make arguments for a contrary policy, it is clearly rational to conclude that the public interest of the Virgin Islands population is better served by denying immunity to the borrowing employer. Having reached this conclusion, I fail to see how the court can find that there is no public purpose supporting the retroactive application provision.

All victims of negligence on the part of Virgin Islands borrowing employers were intended to be beneficiaries of the limits that the legislature thought it had placed on the exclusive remedy provision of the Act. The courts, albeit unintentionally, frustrated the legislature's intent and deprived some intended beneficiaries, like Mr. Vanterpool, of the benefits they were intended to have. Not suprisingly, when the legislature attempted to set the courts straight, it tried to save the rights of as many of the intended class of beneficiaries as it reasonably could. Given that there is a conceded public interest in employees having the intended benefits, this effort cannot be said to be unsupported by a public purpose.

Contrary to the assertion of the court, this is not special interest legislation whether looked at from the viewpoint of those burdened or those benefitted. The Virgin Islands legislature acted broadly to abrogate the borrowed employee doctrine for all employees and all employers for all time, the past, the present, and the future. Nor is there any reason to credit Hess's assertion that only a handful of plaintiffs are benefitted and only one employer burdened by the retroactive aspects of the statute. It was impossible at the time the records in these cases were developed to determine how many would be benefitted and how many burdened. The amendment applies to "(1) claims filed after the effective date of this Act; and (2) claims pending as of the effective date of this Act; regardless of when the accident which gave rise to the claim occurred." Bill No. 498, § 2(b), 16th Legislature (1986), Nieves App. at 151. The

size of the first group was not ascertainable. Those affected by the retroactive provision of the statute may not be numerous. Given the applicable two-year statute of limitations, it is unlikely that many viable claims were saved by the 1986 amendment that were not already saved by the 1984 amendment. But the important thing for present purposes is that neither Hess nor the plaintiffs were singled out for special treatment.

Hess cannot plead that it is the target of legislation solely because it is the biggest private employer in the Virgin Islands and thus the most heavily affected. In *Energy Reserves Group*, the Court noted that, "[g]iven the nature of the industry—sales to public utilities—it is impossible for any regulation not to have a major effect on a small number of participants." 459 U.S. at 418 n. 25, 103 S.Ct. at 708 n. 25. Declining to find the legislation in that case to be for the benefit of special interests, the Court noted that there was no "indication that the Kansas political process had broken down." *Id.* There is no indication in this record that the Virgin Islands political process had broken down or that employers in general and Hess in particular were denied a hearing in that process; indeed, the Governor's veto of the retroactive application amendment suggests that Hess's concerns were not ignored.

The Virgin Islands Act is a creation of the Virgin Islands legislature. When a legislature declares its belief that a court has misunderstood its creation, and the assertion of that belief is plausible, the courts have consistently recognized the legislature's right to cure the court's erroneous interpretation retroactively to the date of that interpretation (*a fortiori*, to pending cases). *E.g., Board of Education of East Windsor Regional School District v. Diamond*, 808 F.2d 987, 995-96 (3d Cir.1986) (upholding Congress' retroactive cure of Supreme Court's interpretation of Education of the Handicapped Act); *Temple University v. United States*, 769 F.2d 126, 134-35 (3d Cir.1985) (upholding Congress' retroactive cure of Supreme Court's interpretation of "wages" for purposes of the Federal Insurance Contributions Act against due process challenge),

cert. denied, —U.S.—, 106 S.Ct. 2914, 91 L.Ed.2d 544 (1986); *Canisius College v. United States,* 799 F.2d 18, 27 (2d Cir.1986) (same), *cert. denied,* —U.S.—, 107 S.Ct. 1887, 94 L.Ed.2d —, 8 Employee Benefits Cas. (BNA) 1488 (1987); *Louviere v. Marathon Oil Co.,* 755 F.2d 428, 430 (5th Cir.1985) (upholding Congress' retroactive cure of Supreme Court's interpretation of Longshoreman's and Harbor Workers' Compensation Act against due process challenge); *Long v. United States Internal Revenue Service,* 742 F.2d 1173, 1183-84 (9th Cir.1984) (upholding Congress' retroactive cure of Ninth Circuit's interpretation of statutory exemption to Freedom of Information Act against due process challenge); *Thomas v. Carnegie-Illinois Steel Corp.,* 174 F.2d 711, 713 (3d Cir.1949) (agreeing with *Battaglia v. General Motors Corp.,* 169 F.2d 254, 259-61 (2d Cir.), *cert. denied,* 335 U.S. 887, 69 S.Ct. 236, 93 L.Ed. 425 (1948), that Congress' retroactive cure of Supreme Court's interpretation of Fair Labor Standards Act did not violate due process); *Abshire v. Potter,* 179 Cal. App.3d 73, 224 Cal.Rptr. 312 (1986) (upholding against due process and contract clause challenge California legislature's retroactive cure of U.S. Supreme Court's interpretation of federal law that was cured prospectively by Congress), *cert. denied,* —U.S.—, 107 S.Ct. 1262, 94 L.Ed.2d 124 (1987); *Sanelli v. Glenview State Bank,* 108 Ill.2d 1, 90 Ill.Dec. 908, 483 N.E.2d 226 (1985) (upholding against due process and contract clause challenge an Illinois legislature's retroactive cure of Illinois Supreme Court decision); *see also* J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 473 (2d Ed.1983) ("[t]he category of cases where the constitutionality of curative statutes is an issue presents another area where the Court will almost always sustain retroactive legislation.").

I am cognizant of the fact that most of the above-cited cases deal with federal legislation and thus involve only due process, rather than contract clause, analysis. I am also aware of Justice Brennan's admonition that the Supreme Court has "never held . . . that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of pre-existing con-

tracts." *Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733, 104 S.Ct. 2709, 2719, 81 L.Ed.2d 601 (1984). Nevertheless, I do not believe the Supreme Court's contract clause analysis would lead it to conclude that retroactive curative amendments in circumstances of this kind are either unsupported by a public purpose or effect an unreasonable accommodation between the public interest and contractual expectations. The Supreme Court knows only too well that statutory interpretation is an inexact science and that legislative intent is not difficult to misconstrue. For this reason, I think it unlikely that the Supreme Court will deny to state and territorial legislatures the curative power it has consistently accorded Congress.

If contract clause analysis were applicable in situations of this kind, I would hold that where a state or territorial legislature has acted to retroactively cure a judicial misinterpretation of one of its statutes, it need not show a public purpose and reasonable accommodation of interests independent of the legislature's desire to cure the court's misinterpretation without excluding some of the intended beneficiaries of the statute. All that need be shown is that there is a public purpose supporting the substantive rule embodied in the statute as corrected, as there clearly is here, and that it is plausible for the legislature to claim that the rule has been its intent all along, which it clearly is here. Accordingly, I would conclude in this case that the retroactive application of the amendment does not violate the contract clause.

III.

Because I find the borrowed employee doctrine inapplicable in these cases, I have no occasion to address the issues discussed in Section III of the court's opinion.

Civ. Nos. 1984/195, 1985/86 and 1985/28.

United States District Court,
D. Virgin Islands,
Aug. 7, 1986.

PAULIPHY PREVOST
and
JOAN PREVOST,

Plaintiffs,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,

Defendant.

PHILLIP SCOTLAND, et ux,

Plaintiff,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,

Defendant.

LOGAN GREENE,

Plaintiff,

v.

MARTIN MARIETTA ALUMINA, INC.,

Defendant.

In workers' compensation suits filed prior to passage of 1986 amendment to Workmen's Compensation Act, which eliminated borrowed employee doctrine as defense to all pending cases, defendants/employers moved for summary judgment based on borrowed employee doctrine, and plaintiffs countered by asserting that 1986 amendments should retroactively apply to pending cases. Defendants challenged constitutionality of 1986 amendment. The District Court, David V. O'Brien, J., held that: (1) in Virgin Islands, rights and obligations of workmen's compensation will be considered to be based on status of employer-employee relationship, so that changes in workmen's compensation schemes are not unconstitutional impairments of contracts; (2) contract clause was not infringed by amendments to Workmen's Compensation Act retroactively abolishing employee defense in pending cases; and (3) amendment was rationally related to legitimate governmental purpose of protecting workmen's compensation resources as well as Virgin Islands' workers, and thus survived constitutional attack on due process grounds.

Motions for summary judgment denied.

1. Constitutional Law • 169
Workers' Compensation • 13

In Virgin Islands, rights and obligations of workmen's compensation will be considered to be based on status of employer-employee relationship, so that changes in workmen's compensation schemes are not unconstitutional impairments of contracts; overruling *Jensen v. McInerney*, 299 F.Supp. 1309 (D.V.I.). Revised Organic Act of the Virgin Islands, § 3, 48 U.S.C.A. § 1561.

2. Constitutional Law • 169
Workers' Compensation • 24

Contract clause was not infringed by amendments to Workmen's Compensation Act retroactively abolishing borrowed employee defense in pending cases, under "status theory" which holds that rights and obligations of workmen's

compensation are based on status of employer-employee relationship. 24 V.I.C. §§ 251 et seq., 263a, 284; Revised Organic Act of the Virgin Islands, § 3, 48 U.S.C.A. § 1561.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law • 117

Although language of contract clause is facially absolute, its prohibition must be balanced against inherent police power of territory to safeguard vital interests of its people. Revised Organic Act of the Virgin Islands, § 3, 48 U.S.C.A. § 1561.

4. Workers' Compensation • 24

Even assuming that in Virgin Islands workmen's compensation rights and obligations were considered implied terms of employment contract invoking contract clause protection, 1986 amendments to Workmen's Compensation Act, retroactively abolishing borrowed employee defense in pending cases, pass constitutional muster, in that amendments are of character appropriate for accomplishing state and public purpose of protection of workmen's compensation resources as well as protection of Virgin Islands' workers. 24 V.I.C. §§ 251 et seq., 263a, 284; Revised Organic Act of the Virgin Islands, § 3, 48 U.S.C.A. § 1561.

5. Constitutional Law • 301(4)
Workers' Compensation • 24

Amendment of 1986 to Workmen's Compensation Act, eliminating borrowed employee doctrine as defense in all pending cases, was validly passed by Virgin Islands Legislature, and thus procedural due process was not infringed. Revised Organic Act of the Virgin Islands, § 3, 48 U.S.C.A. § 1561.

6. Constitutional Law • 48(4)

As legislative acts which adjust economic responsibilities are presumed constitutional, burden is on one complaining of due process violation to establish that legislature has acted in arbitrary and irrational way.

7. Constitutional Law • 190

Retroactive legislation which has proper purpose should be upheld in face of constitutional challenge even though it impairs recognized rights. Revised Organic Act of the Virgin Islands, § 3, 48 U.S.C.A. § 1561.

8. Constitutional Law • 301(4)
Workers' Compensation • 24

Amendment of 1986 to Workmen's Compensation Act, eliminating borrowed employee doctrine as defense in all pending cases, was rationally related to legitimate governmental purpose of protecting workmen's compensation resources as well as Virgin Islands' workers, and thus survived constitutional attack on due process grounds. Revised Organic Act of the Virgin Islands, § 3, 48 U.S.C.A. § 1561.

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Britain H. Bryant, Christiansted, St. Croix, V.I., for Hess Oil Virgin Islands Corp.

R. Eric Moore, Christiansted, St. Croix, V.I., for Martin Marietta Alumina, Inc.

MEMORANDUM OPINION AND ORDER

DAVID V. O'BRIEN, District Judge.

We confront in these cases the issue whether constitutional protections preserve the borrowed employee defense. Specifically we must determine whether the recent amendments to the Workmen's Compensation Act, retroactively abolishing the borrowed employee defense, violate the contract and due process clauses of the Revised Organic Act. Since we find they do not, we will deny the defendants' motions for summary judgment.

I. FACTS

On October 19, 1984, the Virgin Islands' Legislature amended the Workmen's Compensation Act to abrogate the borrowed employee doctrine.[1] This Legislation was silent concerning its application to pending cases.

On January 23, 1986, the Virgin Islands' Legislature again amended the Workmen's Compensation Act specifically eliminating the borrowed employee doctrine as a defense in all pending cases.[2] In the cases before us, workers sustained

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1. The amendment stated:

   263a, Abrogation of the borrowed employee doctrine: It shall not be a defense to any action brought by or on behalf of any employee, that the employee, at the time of his injury or death, was the borrowed, loaned, or rented employee of another employer. Any oral or written agreement between an employer and employee which makes the employee the borrowed, loaned or rented employee of another employer shall be null and void as being against the public policy of this territory.
   24 V.I.C. 263a (Supp. 1985).

2. SECTION 1. (a) Title 24, Section 284, Virgin Islands Code, is amended by designating the existing language as subsection (a) and adding a new subsection (b) to read as follows:

   (b) For the purposes of this Section, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to comply with the provisions of this Chapter with respect to being an insured employer. The "statutory employer and borrowed servant" doctrine are not recognized in this jurisdiction, and an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under Section 272 of this Title.

injuries and filed suits prior to the passage of the 1986 amendment.

Each defendant moved for summary judgment based on the borrowed employee doctrine. *Vanterpool v. Hess Oil V.I. Corp.*, 766 F.2d 117 (3d Cir.1985). The plaintiffs counter these motions by asserting the 1986 amendment specifically provides that the abrogation of the borrowed employees doctrine should retroactively apply to pending cases.

The defendants reply by challenging the constitutionality of the 1986 amendment. Because of the interest in this issue, we invited all counsel, and amicus counsel, to submit briefs addressing the constitutionality of the amendment.

II. DISCUSSION

The defendants raise three constitutional challenges to the 1986 amendment. First, they assert that retroactive application of the 1986 amendment impermissibly impairs their contract rights. These rights arise from the provisions of the Virgin Islands' workmen's compensation scheme which are an "implied" term of all employment contracts. Amending the workmen's compensation scheme by retroactively eliminating the borrowed employee defense unconstitutionally impairs these vested rights.

The second and third constitutional challenges involve the due process clause. The manner in which the 1986 amendment was passed is challenged on procedural due process grounds while the effect of the amendment is challenged on substantive

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(b) Title 24, Section 284, Subsection (b), as added by Section 1 of this Act shall apply to:

(1) claims filed after the effective date of this Act; and

(2) claims pending as of the effective date of this Act; regardless of when the accident which gave rise to the claim occurred.

Act #5145 was passed by the Legislature on January 23, 1986. The Honorable Juan Luis vetoed this act on February 5, 1986. This veto was overridden by the Legislature on February 27, 1986.

due process grounds. The plaintiffs attack the first argument by challenging its initial premise: workmen's compensation schemes are not implied terms of employment contracts but rather relate to the "status" of the employment relationship. Constitutional issues involving the contract clause are not reached since no contract is implicated.

Likewise, procedural due process is not infringed because the act was validly passed by the Virgin Islands Legislature. Finally, the plaintiffs submit that the 1986 amendment is economic and social legislation rationally related to the achievement of a valid legislative purpose and therefore is not a violation of substantive due process.

For the following reasons we find the 1986 amendment is constitutional.

A) Contract Clause

The Revised Organic Act provides in part, "[n]o law impairing the obligation of contracts shall be enacted." Rev.Organ. Act § 3 (1967). Whether a contractual relationship hip is impaired is the threshold inquiry for contract clause issues. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983). If no contractual relationship is impaired, we do not reach this constitutional issue.[3]

1) Status v. Contract

Whether the relationship between an employment contract and workmen's compensation scheme is contractual is the precise issue before us. Since this is a question of first impression, we must look to the rules of common law as generally applied in the United States.[4]

One school of thought considers workmen's compensation rights and obligations as implied terms of the employment contract invoking contract clause protection; *Mitchell v. United*

3. The Supreme Court advises that statutes should be construed to avoid constitutional questions. *Machinists v. Street*, 367 U.S. 740, 749-50, 81 S.Ct. 1784, 1789-90, 6 L.Ed.2d 1141 (1961).

4. No Virgin Islands statute or Restatement of Law section is on point. 1 V.I.C. § 4 (1967).

States Fidelity and Guaranty Co., 206 F.Supp. 489, 490 (E.D. Tenn.1962); *Cooper v. Wicomico Cty., Dept of Public Works*, 278 Md. 596, 366 A.2d 55, 58 (1976); *Miller v. Norris Creameries*, 311 Minn. 343, 250 N.W.2d 161 (1976) citing *Yaeger v. Delano Granite Works*, 250 Minn. 303, 84 N.W.2d 363 (1957),[5] while the opposing school holds that the rights and obligations of workmen's compensation are based on the status of the employer-employee relationship. Changes in workmen's compensation schemes, therefore, are not unconstitutional impairments of contracts. *K-Mart Corp. v. State Indus. Ins. Systems*, 693 P.2d 562, 565-67 (Nev.1985); *Jenkins v. Sal Chemical Co.*, 280 S.E.2d 243, 244 (W.Va.1981) citing *Lester v. State Workmen's Compensation Com'r*, 161 W.Va. 299, 242 S.E.2d 443 (1978) (West Virginia switched from contract theory to status theory); *Price v. All American Engineering Company*, 320 A.2d 336, 339-40 (Del. 1974).[6] Jurisdictions, including the Supreme Court, appear evenly divided between these two theories and we find no clear trend in either direction.[7] The absence of a clear trend in favor of either

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5. For a more exhaustive list of additional cases see the brief of defendant Hess Oil Virgin Islands Corporation at page 16. Additionally, other cases not involving the contract clause support the proposition that workmen's compensation acts are a term of the employment contract. *De Martino v. Zurich Insurance Company*, 307 F.Supp. 571, 573 (W.D.Pa1969) *aff'd* 440 F.2d 1320 (3d Cir.1971); *Jensen v. McInerney*, 229 F.Supp. 1309 (D.V.I.1969); *M. J. Daly Co. v. Varney*, 695 S.W.2d 400 (Ky.1985).

6. For additional support see cases cited in *Lester, supra* 242 S.E.2d at 451 and in *Price, supra* at 339-40. Additionally see *Kaiser Foundation Hospitals v. Workers' Comp.*, 80 Cal.App.3d 787, 146 Cal.Rptr. 86, 99 (Cal.App.1978).

7. Both sides cite Supreme Court decisions which support their respective positions. In *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 44 S.Ct. 153, 68 L.Ed. 366 (1923) the Court stated workmen's compensation legislation rested upon the idea of status and not upon the idea of implied contract while in *State Industrial Commission v. Nordenholt Corp.* 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed. 933 (1922), the same court asserted that awards under workmen's compensation are made upon the theory that compensation statutes are read into and become part of the employment contract. Since we are unable to decipher any favored theory, these counter-poised decisions do not provide guidance.

theory allows us the freedom to adopt the "better rule". *Edwards v. Born, Inc.*, 792 F.2d 387 (3d Cir.1986); *LaPlace v. Sun Insurance Office, Ltd.*, 298 F.Supp. 764, 766 (D.V.I.1969).

Initially we note that some evidence slightly favors the status theory. This evidence is found in *Lester, supra*, which expressly replaced the contract theory with the status theory, and in recent cases such as *K-Mart, supra*.

In *K-Mart*, the Nevada Supreme Court rejected the contract theory after questioning its theoretical footing. Like Nevada, we too question the rationale behind the contract theory.

In general, the contract theory evolved from jurisdictions which allowed employers the option to participate in workmen's compensation programs. Employers received the protection of the statutory bar in exchange for participating in the insurance program, while qualified workers received guaranteed benefits in lieu of possible larger awards from negligence suits. Since workmen's compensation was optional parties freely entered into employment contracts with reference to the statute and the statute was considered an implied term of the contract. *K-Mart, supra*, at 566-567; *Lester, supra*, 242 S.E.2d at 449. This theory is unpersuasive for two reasons.

First, the Virgin Islands Workmen's Compensation scheme is mandatory. 24 V.I.C. § 272 (1970). The initial assumption of the contract theory, therefore, does not conform to our situation. Second, even assuming Virgin Islands' employers could elect into the system, this election is far from voluntary.

The overwhelming advantages of workmen's compensation make an employer's "elective choice" a foregone conclusion. Similarly, it is unlikely that workers make employment decisions based on a prospective employer's workmen's compensation insurance plan.[8] These theoretical problems undermine the persuasiveness of the contract theory. For the above reasons we reject the contract theory.

---

8. For a detailed explanation of the history of workmen's compensation and the contract theory, see *Lester, supra*.

[1, 2] The status theory, on the other hand, views workmen's compensation as incidental to the employment relationship and not an implied term of the employment contract. We believe this is the better view and now adopt the status theory in the Virgin Islands.[9] Since this theory considers workmen's compensation as incidental to the employment relationship the contract clause is not infringed.

2) Contract Clause vs. Police Power

[3, 4] Assuming, arguendo, we adopted the contract theory, and thus satisfied the initial inquiry, our next step would be to determine whether contract clause prohibitions have been breached. Though the language of the clause is facially absolute, its prohibition must be balanced against the inherent police power of the territory to safeguard the vital interests of its people. *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 410, 103 S.Ct. 697, 703, 74 L.Ed.2d 569 (1983), citing *Home Building & Loan Asso. v. Blaisdell*, 290 U.S. 398, 434, 54 S.Ct. 231, 238, 78 L.Ed. 413 (1934). The Third Circuit, summarizing the Supreme Court's contract clause jurisprudence, outlined the criteria used for determining whether the clause has been violated. *Troy Ltd. v. Renna*, 727 F.2d 287, 297 (3d Cir. 1984). The suggested analysis is first to determine whether the state has "a significant and legitimate public purpose behind the" statute and, if so, whether "the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Troy, supra* at 297, quoting *Energy Reserves, supra.* Deference is paid to the legislature's judgment concerning the necessity and reasonableness of a particular measure unless the territory itself is a contracting party. *Id.* Mindful of this standard, we find the 1986 amendments can pass constitutional muster.

As stated in the explanation to the amendment, the bill was intended to allow employees to sue secondary employers and to assist the Department of Labor in its efforts to recoup

9. To the extent that *Mc Inerney, supra*, is in conflict with the holding herein, it is overruled.

monies expended on workmen's compensation.[10] Explanation attached to Bill No. 16-0498 passed as Act No. 5145. Given the required deference to this explanation, we find it satisfies the *Troy* test.

Protection of workmen's compensation resources as well as protection of Virgin Islands' workers are both significant and legitimate public purposes. The adjustments to the rights and responsibilities of the defendants and workers are reasonable particularly when considering the borrowed employee doctrine had only recently been adopted in the Virgin Islands.[11]

Prior to that point the present employees would have been free to bring these actions against third parties. We therefore find the 1986 amendment, which conforms our present law with workmen's compensation practice prior to *Vanterpool, supra,* is of a character appropriate for accomplishing the above stated public purpose.

B) Due Process

Like the contract clause, the due process clause is also included in the Revised Organic Act. Rev.Organ.Act § 3 (1967).

1) Procedural Due Process

[5] We see little merit in a challenge to the 1986 amendment on procedural due process grounds. No suggestion is made that the Sixteenth Legislature was not lawfully elected, did not have the power to act or had incorrectly passed the 1986 amendment. We therefore reject this argument.

---

10. When an injured workman is entitled to damages against a third person in case where the Government Insurance Fund was used to compensate the workman, the commissioner administering the fund may subrogate himself to the rights of the workman and institute proceedings against the third person. 24 V.I.C. § 263 (Supp.1985).

11. The Virgin Islands first adopted the doctrine in *Vanterpool v. Hess Oil Virgin Islands Corp.*, 589 F.Supp. 334 (D.V.I.1984) reversed in part 766 F.2d 117 (3d Cir.1985).

2) Substantive Due Process

[6] Initially we note that legislative acts which adjust economic responsibilities are presumed constitutional, the burden being on the one complaining of the due process violation to establish that the legislature has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). The Supreme Court has upheld against due process attack the competence of Congress to adjust economic rights and duties in the workmen's compensation field. *Usery, supra* at 15, 96 S.Ct. at 2892; *New York Central R. Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917).

[7, 8] The *Usery* opinion suggests that a legislature may overcome the traditional bias against retrospective statutes as long as it rationally relates the legislation to a legitimate governmental purpose. Legislation which as a proper purpose should be upheld even though it impairs recognized rights. J. Novak, R. Rotunda, J. Young, *Constitutional Law*, (1978). As stated in our analysis for the contract clause, the 1986 amendment is rationally related to a legitimate governmental purpose. We therefore hold the amendment survives constitutional attack on due process grounds.

Further support for this holding is found in an analogous case, *Louviere v. Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985). In *Louviere*, rights and duties under the Longshoremen's and Harbor Workers' Compensation Act, ("LHWCA"), were challenged on substantive due process grounds. The District Court granted summary judgment in favor of the employer based on *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984). *Washington Metro* established immunity for a general contractor from tort suits brought by a subcontractor's employees unless, after the subcontractor failed to secure workmen's compensation coverage, the contractor also neglected to secure coverage. *Louviere, supra*, at 429.

After the District Court correctly applied the *Washington Metro* case, Congress amended the LHWCA to negate the holding of *Washington Metro*. *Louviere, supra,* at 429. Congress specifically provided that the amendment apply to all pending cases. 33 U.S.C. § 901(a). On appeal the Fifth Circuit rejected a due process argument and reversed the District Court's grant of summary judgment. We too will reject the substantive due process argument before us.

III. CONCLUSION

Since we find the 1986 amendment survives all three constitutional attacks, the borrowed employee doctrine is no longer a valid defense and therefore we will deny the respective motions for summary judgment.

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Civil No. 1984/195

PAULIPHY PREVOST
and
JOAN PREVOST,

Plaintiffs

vs.

HESS OIL VIRGIN ISLANDS CORPORATION,

Defendant

Civil No. 1985/86

PHILLIP SCOTLAND,

Plaintiff

vs.

HESS OIL VIRGIN ISLANDS CORPORATION,

Defendant

ORDER

THIS MATTER is before the Court on motion of the defendant for certification of this Court's order entered August 7, 1986, which denied summary judgment. Defendant seeks certification for purposes of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Since we believe the issue of retroactivity of Act No. 5145 of the Virgin Islands government to pending cases, which we upheld, involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate determination of the litigation.

This is particularly true because there are now pending before the Third Circuit appeals which will also deal with the validity of the government's abrogation of the borrowed employee defense on a retroactive basis by reason of Act. No. 5145. The Third Circuit might find consolidation of those appeals, now believed to be scheduled for December, 1986, with the within interlocutory appeals, would be beneficial in terms of judicial economy.

The premises considered, now therefore it is

ORDERED:

THAT the motion for certification for purposes of interlocutory appeal of the order of August 7, 1986 denying summary judgment to the defendant is GRANTED; and

THAT the question for interlocutory appeal shall be:

> Did the district court err in upholding the validity of Act. No. 5145 of the government of the Virgin Islands, which abrogated the borrowed employee defense and applied such abrogation retroactively to all pending cases?

DATED this 25th day of August, 1986.

ENTER:

DAVID V. O'BRIEN, USDJ

ATTEST: Orinn Arnold
Clerk

By: _____
Deputy

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CIVIL NO. 1983/93

GEORGE THOMAS,

Plaintiff

vs.

HESS OIL VIRGIN ISLANDS CORP.,

Defendant

CIVIL NO. 1984/205

JOSEPH TAYLOR,

Plaintiff

vs.

HESS OIL VIRGIN ISLANDS CORP.

CIVIL NO. 1984/318

SAMUEL COTTO,

Plaintiff

vs.

HESS OIL VIRGIN ISLANDS CORP.

CIVIL NO. 1984/336

ANTONIO NIEVES
and
ELLEN SCHUSTER NIEVES,

Plaintiffs

vs.

HESS OIL VIRGIN ISLANDS CORP.

ORDER

THIS MATTER is before the Court in each of the four separate cases captioned above, on motions of the various plaintiffs for reconsideration of our judgment dismissing their cases on the basis of *Vanterpool v. Hess Oil Virgin Islands Corp.*, 766 F.2d 117 (3d Cir. 1985). The plaintiffs argue that we should vacate our judgment in each case, and apply the rule of retroactivity of statutes as enunciated in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). In *Bradley* the Supreme Court held that a court is to apply the law which is in effect at the time it renders its decision, unless to do so would result in "manifest injustice". *Bradley* at 711. The *Bradley* case had to do with the broad nationwide issue of school desegregation. The Supreme Court differentiated this kind of litigation from private cases between individuals. *Bradley* at 717.

Indeed, the Third Circuit followed *Bradley* in *Kirby v. United States Government*, 745 F.2d 204, 209 (3d Cir. 1984) in giving its interpretation to the National Housing Act Section 202(d) (2) (B), as amended, 12 U.S.C.A. Section 1701q(d) (2) (B).

Plaintiffs argue that we should reconsider our judgment in the above cases in light of a legislative amendment to the Virgin Islands Workmen's Compensation Act which eliminates the borrowed employee doctrine as a defense to an action brought by or on behalf of any employee. 24 V.I.C. Section 263a. It was on the basis of the application of the borrowed employee doctrine that we decided *Vanterpool v. Hess Oil Virgin Islands Corp.*, 589 F. Supp. 334 (D.V.I. 1984). Between the issuance of our decision and the Third Circuit decision which affirmed the application of the borrowed employee doctrine in the Virgin Islands at 766 F.2d 117, the amendment referred to above was enacted into law.

The Third Circuit was well aware of the amendment when it heard oral argument and then decided *Vanterpool*. But it

expressly declined to apply the amendment retroactively when it stated:

> The amendment's effect is prospective only. Thus, the revised statute, while applicable in future cases, does not govern the present controversy.

Vanterpool, supra, 766 F.2d at 119 n 1.

Clearly, the Third Circuit considered, as we do, that to apply the statute retroactively in litigation involving only private parties, would be a manifest injustice to one of the parties who, acting under existing law, made significant and legitimate business decisions. What the plaintiffs actually seek is to have those legitimate business decisions, legal when made, declared illegal *ex post facto.* That is what the effect of a retroactive application of the amendment adopted by the Virgin Islands Legislature would be.

Since each of the cases captioned above falls into the same category, i.e., are based on incidents which occurred prior to passage of the amendment, we will follow the Third Circuit holding quoted above and decline to retroactively apply the amendment.

The premises considered, now therefore it is

ORDERED:

THAT the plaintiffs' motions for reconsideration are DENIED.

DATED this 12th day of December, 1985.

ENTER:

DAVID V. O'BRIEN, USDJ

ATTEST: Geoffrey Barnard
Clerk

By: _____
Deputy

NO. 86-3584

On Appeal from the United States District Court of the Virgin Islands
(D.C. Civil No. 85-86)
Division of St. Croix, Christiansted Jurisdiction

PHILLIP SCOTLAND
and
PEARLINE SCOTLAND
v.
HESS OIL VIRGIN ISLANDS CORPORATION,
Appellant

NO. 86-3585

On Appeal from the United States District Court of the Virgin Islands
(D.C. Civil No. 84-195)
Division of St. Croix, Christiansted Jurisdiction

PAULIPHY PREVOST
v.
HESS OIL VIRGIN ISLANDS CORPORATION,
Appellant

Present: SLOVITER, STAPLETON and ROSENN, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and argued by counsel December 1, 1986.

On consideration of the judgments of the said District Court, entered August 7, 1986 in D.C. Civ. Nos. 84-195 and 85-86, which were certified to this Court pursuant to 28 U.S.C. § 1292(b), it is now here ordered and adjudged by this Court that the causes be remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

Clerk

May 22, 1987

Certified as a true copy and issued in lieu of a formal mandate on June 26, 1987. In #86-3585 *only*.

Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

NO. 86-3049

On Appeal from the United States District Court of the Virgin Islands (D.C. Civil No. 84-336) Division of St. Croix, Christiansted Jurisdiction

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANTONIO NIEVES
and
ELLEN SCHUSTER NIEVES, *Appellants*
v.
HESS OIL VIRGIN ISLANDS CORPORATION

NO. 86-3065

On Appeal from the United States District Court of the Virgin Islands (D.C. Civil No. 84-318) Division of St. Croix, Christiansted Jurisdiction

SAMUEL COTTO, *Appellant*
v.
HESS OIL VIRGIN ISLANDS CORPORATION

NO. 86-3066

On Appeal from the United States District Court of the Virgin Islands (D.C. Civil No. 84-205) Division of St. Croix, Christiansted Jurisdiction

JOSEPH R. TAYLOR, *Appellant*
v.
HESS OIL VIRGIN ISLANDS CORPORATION

NO. 86-3067

On Appeal from the United States District Court of the Virgin Islands (D.C. Civil No. 83-0093) Division of St. Croix, Christiansted Jurisdiction

GEORGE THOMAS, *Appellant*
v.
HESS OIL VIRGIN ISLANDS CORPORATION

Present: SLOVITER, STAPLETON and ROSENN, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the District Court of the Virgin Islands, Division of St. Croix, Christiansted Jurisdiction and were argued by counsel December 1, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered December 12, 1985 in D.C. Civ. Nos. 84-336, 84-318, 84-205 and 83-93, be, and the same are hereby affirmed. Costs taxed against the appellants.

ATTEST:

Clerk

May 22, 1987

Certified as a true copy and issued in lieu of a formal mandate on June 30, 1987, as to Nos. 86-3049, 86-3065/6/7 *only*.

Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3585

Pauliphy Prevost

v.

Hess Oil Virgin Islands Corporation,
Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN and ROSENN, *Circuit Judges.*

The petition for rehearing filed by

Appellant, Hess Oil Virgin Islands Corporation, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Stapleton would have granted the petition for rehearing.

By the Court,

Circuit Judge

Dated: June 18, 1987

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 86-3049, 86-3065/6/7

Antonio Nieves et al.,

Appellants

v.

Hess Oil Virgin Islands Corp., etc.

SUR PETITION FOR REHEARING

Present: GIBBONS, *Circuit Judge,* SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN and ROSENN, *Circuit Judges.*

The petition for rehearing filed by

Appellants, Antonio Nieves et al., in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Stapleton would grant the petition for rehearing.

By the Court,

Circuit Judge

Dated: June 22, 1987

Supreme Court, U.S.
FILED
NOV 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-458

In the Supreme Court of the United States

OCTOBER TERM, 1987

ANTONIO NIEVES, et al.
Petitioners,

v.

HESS OIL VIRGIN ISLANDS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Contract Clause Impose A Different Judicial Standard Than the Due Process Clause?

II. Is the Contract Clause Violated by a Virgin Islands Law which Retroactively Alters Private Contractual Relations by Substantially Increasing a Private Employer's Burdens in a Manner Which is Both Unreasonable and Unnecessary?

III. Does a Retroactive Law which Is Designed to Alter the Outcome of Pending Litigation, So As to Increase the Revenues of the Virgin Islands Workmen's Compensation System at the Expense of the Island's Largest Employer Violate the Taking Clause or the Due Process Clause?

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STATEMENT OF THE CASE

In 1976, Hess Oil Virgin Islands Corp. ("Hess" or "HOVIC")[1] and Litwin Panamerican Corporation ("Litwin") entered into a contract whereby Litwin provided personnel to perform general maintenance and turnaround work at the Hess refinery on St. Croix. Under that contract, Litwin classifies its workers into two groups. Employees in the class involved here are Type I personnel, who are furnished "as loanees under HOVIC's direction and control in the numbers and by the skills as ordered from time to time by HOVIC." *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1240 (3d Cir. 1987) (Petition for Certiorari [Pet. for Cert.] at A-6). Hess assumed direct control over these employees, and Litwin was not "responsible to HOVIC or liable for the workmanship of such personnel or for any mistake, error or act of negligence of such personnel." *Id.* (Pet. for Cert. at A-6). Hess reimburses Litwin for all payroll expenses for Type I employees, including workmen's compensation premiums. *Id.* at 1245-46 (Pet. for Cert. at A-18, A-19). Litwin's practice was to have each Type I employee sign a Hess loanee form, which states:

> This is to inform you of the conditions under which you will be working as a "HESS LOANEE." You should be aware that while working as a loanee:
>
> 1. HOVIC personnel will control, direct, and supervise all aspects of your work.
> 2. At no time should you receive, or act under instructions from Litwin Supervision.
> 3. HOVIC will provide you with safety equipment and will ensure that all safety conditions surrounding your work are met.

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[1] Hess Oil Virgin Islands Corp. is a wholly-owned subsidiary of Amerada Hess Corp. An affiliated company is the St. Croix Petrochemical Corp.

Quoted in Nieves, 819 F.2d at 1240 (Pet. for Cert. at A-7).

In 1984, the United States District Court for the Virgin Islands held that the "borrowed servant" doctrine applies in the Virgin Islands (as it does in most states), and that this doctrine bars a tort action by a borrowed employee against a borrowing employer, like Hess. *See Vanterpool v. Hess Oil Virgin Islands Corp.*, 589 F. Supp. 334, 339 (D.V.I. 1984), *aff'd in part and rev'd in part*, 766 F.2d 117 (3d Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986). This holding was an explicit judicial acknowledgement of the borrowed servant doctrine, which had long been relied upon by Hess in structuring its Virgin Islands business relations and in defending tort suits there. *See, e.g., Yves Charlec et al. v. Hess Oil Virgin Islands*, Civ. No. 255/1981 (D.V.I.) (asserting borrowed servant doctrine as defense in answer in 1981 and again in summary judgment motion one year later).

On October 19, 1984, the territorial Senate amended the Workmen's Compensation Act so as to abrogate the borrowed employee doctrine. *See* V.I. Code Ann. tit. 24, §263a (1986). In *Vanterpool*, the Third Circuit agreed with the District Court that the borrowed employee doctrine applied in the Virgin Islands and noted that the 1984 amendment's effect was "prospective only." 766 F.2d at 119 n.1.

On January 23, 1986, during the pendency of the instant actions, the territorial Senate again amended the Workmen's Compensation Act to abrogate the borrowed employee doctrine. 1986 Sess. Laws 498 (an amendment to V.I. Code Ann. tit. 24, §284). This amendment was made applicable to "claims pending as of the effective date of this Act; regardless of when the accident which gave rise to the claim occurred." 1986 Sess. Laws 498, §1(b) (Pet. for Cert. at 2). In that single day, the bill was introduced, assigned by Senate President Hodge to the Committee of

the Whole, called to the floor by Special Order of Senator Hodge, and passed by the territorial legislature. This abbreviated approach bypassed the usual committee process.[2]

In presenting the bill, its sponsor made it clear that this retroactive legislation was aimed directly at Hess in the very cases now before this Court:

> You take an employee of Litwin which is a subcontractor of Hess, the Litwin employee cannot sue Litwin for an injury caused by a Litwin Employee or as a result of Litwin's negligence. But the employee could sue Hess if the accident occurred on Hess work place, and there is some responsibility for the injury on the part of Hess.... Everything was going fine until the courts began to uphold what is called the "borrowed servant" doctrine.... [T]he Litwin employee is now being construed to be an employee of Hess. And that, as a matter of law, now is preventing the Litwin employee from suing Hess for negligence caused by a Hess employee.

Third Circuit Appendix in *Prevost v. Hess Oil Virgin Islands Corp.* [3d Cir. App.] at 168-69.

On February 5, 1986, Governor Juan Luis vetoed the bill. In his veto message, the Governor noted the cases then pending in which Hess had asserted the borrowed employee defense:

> The most damaging result that I perceive should the measure become law, however, is that an already severely threatened Virgin Islands insurance industry would be dealt a possibly fatal

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[2] The bill did not even appear on the Agenda prepared for that day; instead, on the morning the bill was introduced, the rule requiring listing on the Agenda was waived. Indeed, even reading of the bill was waived.

> blow should recoveries in the six cases pending before the District Court even approach the [$5,500,000] prayed for.

3d Cir. App. at 177. Governor Luis also remarked upon the legislature's cursory consideration of the bill:

> [It] was introduced and passed on the same day, quite possibly without full understanding of its implications and effects by some of the members voting for it.... [T]he question...is...one that demands close scrutiny and careful deliberation. This was not permitted to occur.

Id. at 177-78. *See also Nieves*, 819 F.2d at 1241. On February 27, 1986, without any discussion or debate whatsoever, the legislature overrode the Governor's veto. 3d Cir. App. at 183.

The challenged law was enacted specifically to abrogate the borrowed employee defense in cases *already pending* before the federal Court of Appeals and District Court -- Petitioners' cases. Even the Official Explanation accompanying the legislation evidences the direct targeting of Hess:

> Take a situation where a Litwin employee is injured at Hess. Under the present law, the Courts say our Legislature intended not only to grant immunity to the injured worker's employer, Litwin, but also to Hess. The Bill would avoid that.... Under the bill, for example, if the Litwin employee is badly hurt as a result of the negligence of Hess and the employee has collected $25,000.00 in workmen's compensation benefits, if he can sue Hess for his injury, the first

> $25,000.00 of his recovery is paid to workmen's compensation.

Id. at 162-63.

Petitioners herein (and one other plaintiff) instituted these actions against Hess in the United States District Court for the Virgin Islands before the passage of the challenged statute. Also, before the challenged 1986 statute's passage, and on the basis of the ruling in *Vanterpool* that the 1984 amendment operated prospectively only, the District Court applied the borrowed employee doctrine, and granted Hess summary judgment against Petitioners Nieves, Taylor, Thomas, and Cotto. *Nieves*, 819 F.2d at 1242 (Pet. for Cert. at A-10). All four appealed to the Third Circuit.

After passage of the retroactive statute, the District Court upheld its retroactive application in pending cases brought by Petitioner Prevost and one other plaintiff. That court rejected Hess' constitutional attack on the retroactive amendment, concluding that "the borrowed employee doctrine is no longer a valid defense." *Prevost v. Hess Oil Virgin Islands Corp.*, 640 F. Supp. 1220, 1225 (D.V.I. 1986). Hess then filed interlocutory appeals to the Third Circuit in these two cases, which were consolidated with the prior appeals by the other four Petitioners.[3]

The Court of Appeals for the Third Circuit reversed the District Court's constitutional ruling. They held the retroactive statute to be a violation of the Contract Clause of the Virgin Islands Organic Act, following this Court's precedents under the Contract Clause of the U.S. Constitution. Judge Sloviter's opinion for the Third Circuit found a

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[3] One of these six plaintiffs later settled, so only five cases remain active.

valid, pre-existing contract between Hess and each of the plaintiffs (Petitioners), a substantial impairment of those contracts by the 1986 Virgin Islands statute, and a lack of reasonableness or necessity to justify that impairment. *Nieves*, 819 F.2d at 1252 (Pet. for Cert. at A-30). The Court of Appeals for the Third Circuit, without dissent, later denied Petitioners' motions for rehearing and for rehearing en banc.[4]

Petitioners subsequently filed their Petition for a Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE PETITION RAISES NO IMPORTANT, UNSETTLED QUESTIONS WORTHY OF THIS COURT'S TIME

A. *The Well-Settled Difference in Judicial Scrutiny of Contract Clause Claims and Due Process Clause Claims is Based Upon Constitutional Text, History, and Precedent*

The principal argument presented in the Petition for Certiorari would require this Court to overrule a line of well-established precedents dealing with the Contract Clause and the Due Process Clause. Petitioners baldly assert that the difference between the heightened level of judicial scrutiny under the Contract Clause, applicable only to states and territories, and the more relaxed scrutiny of Congressional legislation, under the Due Process Clause, "has never been directly confronted by the Supreme

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4. In a collateral proceeding, the Third Circuit, on September 22, 1987, also rejected a motion for remand on the ground that 28 U.S.C. §2403(b) is not applicable to the Virgin Islands.

Court." Pet. for Cert. at 6. But this Court has fully settled that very issue several times, in a series of consistent rulings, and the Third Circuit merely applied this well-settled law. As recently as 1984, this Court unanimously rejected the very same argument now urged by Petitioners, insisting:

> We have never held, however, that the principles embodied in the Fifth Amendment's Due Process Clause are coextensive with prohibitions existing against state impairments of preexisting contracts.

Pension Benefit Guaranty Corporation v. R. A. Gray & Co., 467 U.S. 717, 733 (1984), *citing Philadelphia, B. & W. R. Co. v. Schuber*, 224 U.S. 603 (1912). The *Gray* Court added:

> Indeed, to the extent that recent decisions of the Court have addressed the issue, we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses.

467 U.S. at 733, *citing United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977).

One year later, this Court, again in a unanimous opinion, reaffirmed: "When the court reviews state economic legislation the inquiry will not necessarily be the same. [citing *Gray*] . . . [T]o the extent the standards differ, a less searching inquiry occurs in the review of federal economic legislation." *National R.R. Passenger Corp. v. Atcheson, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472-73 n.25 (1985)(Marshall, J., for all members of the Court, except Powell, J., who took no part). *Cf. Camden United Bldg. & Constr. Trades v. City of Camden*, 465 U.S. 208, 220-23

(1984) (contrasting judicial scrutiny under Privileges and Immunities Clause with review under Contract Clause); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880-81 (1985) (contrasting Commerce Clause and Equal Protection Clause analysis).

The distinction between Due Process and Contract Clause analyses is rooted not only in the actual language of the Constitution but also in its history. *See Gray*, 467 U.S. at 723 n.9, *relying upon* ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 546 (2d ed. 1876), and 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 619 (1911). *See generally* Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 529-34 (1987).[5]

Thus, in the instant case, the Third Circuit simply applied this Court's well-established precedents on this point. *See Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243, 1251 (3d Cir. 1987) (Pet. for Cert. at A-13, A-28 to A-29). The other Courts of Appeals have done the same. *See, e.g., New England Baptist Hospital v. United States*, 807 F.2d 280, 284-85 (1st Cir. 1986); *Canisius College v. United States*, 799 F.2d 18, 25 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1887 (1987); *Terson Co., Inc. v. Bakery Drivers and Salesmen Local*, 739 F.2d 118, 120-21 (3d Cir. 1984); *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1263-66 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

In short, Petitioners have failed to present any

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5. Furthermore, the more searching scrutiny under the Contract Clause compared to the Due Process Clause represents a good public policy, reflecting the different nature of Congressional statutes and state or territorial legislation. See Part III B, *infra*.

reason for this Court to overrule its well-settled line of precedents--which are textually based, historically rooted, and supported by solid public policy. These precedents firmly establish that the Third Circuit was correct in applying searching judicial scrutiny under the Contract Clause.

B. *The Territorial Legislation Invalidated in This Case is Not the Same as the Congressional Statute Considered in the Louviere Case*

Petitioners repeatedly assert that the retroactive Virgin Islands statute invalidated in this case is "modelled after an identical retroactive Congressional enactment," upheld by the Court of Appeals for the Fifth Circuit. Pet. for Cert. at 8. This assertion is simply incorrect. The Congressional statute--amendments to the Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 98-426, 98 Stat. 1639 (1984)--was designed to overrule *Washington Metropolitan Area Transit Auth. v. Johnson*, 467 U.S. 925 (1985). That case dealt only with the narrow question of the immunity of general contractors from tort claims by their subcontractors' employees. Therefore, the 1984 federal act designed to overrule *Washington Metro* provided:

> For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails [to pay workmen's compensation].

33 U.S.C. §905(a). This federal statute was upheld in *Louviere v. Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985).

The 1986 Virgin Islands statute involved in the instant case does include this same language--dealing with general contractors and subcontractors--*but* it goes on to

repeal the borrowed servant doctrine retroactively, with the following language:

> The "statutory employer and borrowed servant" doctrine are not recognized in this jurisdiction, and an injured employee may sue any person responsible for his injuries other than the employer named in a certificate of insurance issued under Section 272 of this Title.
>
> (b) Title 24, Section 284, Subsection (b), as added by Section 1 of this Act shall apply to:
> (1) claims filed after the effective date of this Act; and
> (2) *claims pending as of the effective date of this Act;* regardless of when the accident which gave rise to the claim occurred.

1986 V.I. Sess. Laws 498 (emphasis added). It is *this* unconstitutional language (which was *not* included in the valid 1984 federal legislation) that is the subject of *this* lawsuit. Indeed, the "legislative history of the 1984 [federal statute] unambiguously demonstrates" that it did *not* repeal or amend the borrowed servant doctrine. *West v. Kerr-McGee Corp.*, 765 F.2d 526, 530 (5th Cir. 1985). *Accord Alexander v. Chevron, U.S.A.*, 806 F.2d 526, 529 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 3229 (1987).

The 1986 Virgin Islands statute does more than the Congressional statute involved in *Louviere*, and it is this something more--retroactive repeal of the borrowed servant doctrine--which was challenged by Respondent in the instant case and which rightly resulted in the invalidation

of the retroactive portion of that Virgin Islands Law.[6]

In short, Petitioners can find no solace in the Fifth Circuit's *Louviere* opinion for two reasons: (1) The Contract Clause provides much stricter standards for territorial legislation than the Due Process Clause provides for Congressional legislation, and (2) These two statutes are, in any event, totally different in directly relevant respects.

II. THE COURT OF APPEALS CORRECTLY RULED THAT A TERRITORIAL STATUTE WHICH FUNDAMENTALLY IMPAIRS WELL-ESTABLISHED CONTRACTUAL RELATIONS VIOLATED THE CONTRACT CLAUSE OF THE VIRGIN ISLANDS ORGANIC ACT

The Court of Appeals for the Third Circuit correctly ruled that the Virgin Islands statute retroactively abrogating the borrowed servant defense violated the Contract Clause of the Virgin Islands Revised Organic Act.[7] Though this ruling was based upon rules and principles derived from this Court's well-established Contract Clause precedents, the Third Circuit's statutory interpretation has no direct effect outside the Virgin Islands.

Since the early years of the American Republic, the Contract Clause of the U.S. Constitution[8] has stood as a bulwark against state attempts to repudiate or impair the contractual expectations of private parties. *See United*

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6. Respondent Hess does not challenge the *prospective* aspect of this statute, §(b)(1) above, nor does it challenge the prospective 1984 statute.

7. The relevant provision specifies: "[n]o law impairing the obligation of contracts shall be enacted." 48 U.S.C. §1561 (1982).

8. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, §10, cl. 1.

States Trust Co. v. New Jersey, 431 U.S. 1, 14-15, 17 (1976); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 414 (1978). *See also* Kmiec & McGinnis, *supra*, at 530. As this Court recently observed:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978). Similarly, the Contract Clause was one of the few specific limitations upon government power included in the original Organic Act of the Virgin Islands, ch. 699, §34, 49 Stat. 1807, 1815 (1936), and it is reaffirmed in the current Revised Organic Act, 48 U.S.C. §1561 (1982).

This Court's recent decisions demonstrate the continuing vitality and strength of the Contract Clause. They require a court, in analyzing a Contract Clause claim, to determine:

(1) Is there a contractual relationship;

(2) What are the contractual terms;

(3) Does the challenged law impair one or more contractual terms;

(4) Is the impairment both:

(a) *necessary* to the accomplishment of a significant and legitimate public purpose, and

(b) imposed upon *reasonable conditions*.

See U.S. Trust, 431 U.S. at 17-21 (invalidating retroactive repeal of statutory bond covenant because this impairment was neither reasonable nor necessary to serve an important public purpose); *Allied Structural Steel*, 438 U.S. at 244-51 (invalidating state act which retroactively imposed new pension obligations upon an employer). *See generally* M.D. GELFAND, FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT 117-19 (1984). When this stringent judicial analysis is applied to the challenged Virgin Islands statute, that retroactive law cannot pass constitutional muster.

A. *Respondent Has Well-Established Contractual Relationships*

The retroactive statute invalidated in this case materially and substantially impaired two sets of contracts--the contracts of hire between Hess and its borrowed employees and the contract between Hess and Litwin.

The Third Circuit correctly concluded that a contractual relationship exists between Hess and its loanee employees. All five Petitioners were hired by Litwin to work as Hess Loanee employees pursuant to the Hess/Litwin Personnel Agreement. Each Petitioner entered into a contract of hire with Hess and signed a document informing him that he would be working as a "Hess Loanee" under the supervision and control of Hess. At the time of the alleged injuries, each Petitioner had been working continuously for an extended period of time as a loanee;

therefore, each had ample opportunity to assess and acquiesce in the risks attendant to this special employment. Under these circumstances, no one now can question the existence of a contract of employment between each of Petitioners and Hess. *See Vanterpool v. Hess Oil Virgin Islands Corp.*, 589 F.Supp. 334 (D.V.I. 1984), *rev'd in part on other grounds*, 766 F.2d 117 (3d Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986); *Nieves*, 819 F.2d at 1244 (Pet. for Cert. at A-14 to A-19).

Since 1976, Hess also has been party to a labor brokerage contract, in which Litwin provides personnel to be under the "direct supervision, direction, and control" of Hess. *Nieves*, 819 F.2d at 1240 (Pet. for Cert. at A-6). In turn, Hess includes payroll expenses, *including workmen's compensation premiums*, in the time and materials rate paid to Litwin. *Id.* at 1246 (Pet. for Cert. at A-19). Hess thereby budgets the expense of workmen's compensation for its borrowed employees as a cost of doing business. Indeed, the shifting of the costs of industrial accidents to the price of the finished goods is a major rationale behind workmen's compensation schemes. *See* A. LARSON, WORKMEN'S COMPENSATION LAW §1.00 (1985). The Litwin/Hess labor brokerage contract and the long-standing course of business between these two companies are protected by the Contract Clause from the unreasonable and unnecessary interference by the challenged amendment. *See E.& E. Hauling, Inc. v. Forest Preserve Dist.*, 613 F.2d 675, 680 (7th Cir. 1980) ("the District used its legislative authority to prevent the [party] from fulfilling its contract"). The retroactive statute fundamentally restructured the contractual relations between these two private parties, thereby substantially impairing the contract. As the restructuring was retroactive, it was impossible for the parties to bargain and rearrange the burdens

imposed by the new law.

B. *The Borrowed Servant Defense Was A Term of the Contracts*

The exclusive remedy provision of the Virgin Islands Workmen's Compensation Act in effect at the time the agreement was reached between Hess and its borrowed employees is an implied term of the contract between the parties. *See Wood v. Lovett*, 313 U.S. 362, 369 (1941); *Indiana* ex rel. *Anderson v. Brand*, 303 U.S. 95, 100-01 (1938). Where, as here, an employee begins work for an employer covered under the Workmen's Compensation Act, he is automatically limited to remedies under the compensation scheme. *Vanterpool*, 766 F.2d at 122-23. At the times Petitioners and Hess entered into contracts of hire, as well as on the dates of alleged injuries, the Act provided that workmen's compensation was their exclusive remedy against Hess. Indeed, payment of workmen's compensation premiums "is the recognized quid pro quo for the employer's insulation from tort liability to its employees." *Nieves*, 819 F.2d at 1246 (Pet. for Cert. at A-19, *citing Washington Metropolitan Area Transit Auth. v. Johnson*, 467 U.S. 925, 931-32 (1984); and *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 282 & n.24 (1980). Thus, Hess' tort immunity was the inevitable consequence of Hess' compliance with the Act. *See Nieves*, 819 F.2d at 1246 (Pet. for Cert. at A-19 to A-20).

C. *The Legislation Was A Substantial Impairment of Hess' Contractual Relations*

The Virgin Islands statute did much, much more than simply extend a statute of limitations or slightly modify remedies. Rather, it destroyed the contractual provisions which limited Petitioners solely to workmen's compensation remedies for injuries incurred in the scope of their employment. It was, therefore, similar to the

statutory provision invalidated in *Allied Structural Steel*, where this Court observed that "severe impairment . . . will push the inquiry to a careful examination of the nature and purpose of the state legislation." 438 U.S. at 245. Furthermore, the statute in the instant case was not designed to deal with an emergency nor to effectuate a temporary alteration of contractual relations. *Compare Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (legislation aimed at a serious housing emergency during the Depression; limited to duration of emergency).

The legislature's *retroactive* abrogation of the borrowed employee doctrine has altered the very basis of the labor brokerage contract--the calculation of Hess' labor costs. *See* Part II A and B, *supra*. This *selective* abolition of defenses does not remotely resemble the "generally applicable rule of conduct" involved in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 (1983). Rather, Hess' reliance on long-standing, judicially enforced business custom and practice has been trivialized by legislative fiat.

With respect to future cases, Hess may protect itself by changing its business agreements. However, for the five pending cases, whose *ad damnum* clauses total over five million dollars, Hess has no such means to alleviate the serious disruption of its settled expectations.

D. *The Legislation Did Not Further A Significant Public Purpose.*

The "requirement of a legitimate public purpose guarantees that the state is exercising its police power rather than providing a benefit to special interests." *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983). Though the statute purported to "assist persons who are injured while on the job," 3d Cir. App. at 162-63, the legislative history and the Governor's veto message (*see* "Statement of the Case," *supra*, at 3-5),

demonstrate that this retroactive provision was designed to benefit *only six* employees--to the substantial detriment of Hess. *See Nieves*, 819 F.2d at 1250 (Pet. for Cert. at A-27). The territorial legislature had already abrogated the borrowed employee doctrine for all future . . .cases--a matter. . . not challenged in this case--and the Third Circuit had ruled that that provision had prospective effect only. *See Vanterpool*, 766 F.2d at 119-20 n.1. Therefore, the sole effect of the retroactive statute invalidated in this case was to overcome Hess' tort immunity in the handful of already pending suits now being pursued by Petitioners.

The statute singles out the largest private employer in the territory--Hess Oil Virgin Islands Corporation--and substantially increases that targeted employer's burdens on a retroactive basis. The statute's focus remarkably resembles that of the special interest legislation invalidated by this Court in *Allied Structural Steel*. Though both statutes were framed in general terms, neither could be characterized as "one enacted to protect a broad societal interest rather than a narrow class." 438 U.S. at 249. *See also Eagerton*, 462 U.S. at 191 (statute should impose "a generally applicable rule of conduct designed to advance 'a broad societal interest'"). For this reason, the Third Circuit rightly concluded that the Virgin Islands statute was "special interest legislation." *See Nieves*, 819 F.2d at 1251 (Pet. for Cert. at A-29).

1. *The Legislation Was Not Necessary*

In its analysis of the retroactive statute, the Third Circuit employed the more lenient standard applicable to statutes altering contracts between private parties. *See Nieves*, 819 F.2d at 1251 (Pet. for Cert. at A-30). Even

under this lenient standard,[9] the Court concluded that the statute was not necessary to further its asserted purposes. Indeed, the territorial legislature's assertion that the retroactive amendment was necessary to support the Government Insurance Fund is premised upon nothing more than the conjecture of the bill's sponsor.[10]

2. *The Legislation Was Not Imposed Upon Reasonable Conditions*

The retroactive legislation is not based upon "reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *U.S. Trust*, 431 U.S. at 22.

The territorial legislature never considered the reasonableness of the bill *vis-a-vis* its retroactive impairment of employment contracts between Hess and its borrowed employees. In fact, in an eleventh hour dash to avoid the legislative committee process and push the bill through in a single day, the legislature seems to have given little, if any, consideration to the bill. *See* "Statement of the Case," *supra*, at 3-5. Thus, the territorial legislature

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9. Although the contracts at issue are between private parties, it is arguable that a stricter standard is appropriate here, given the governmental self-interest involved. One of the asserted purposes was to supplement the Government Insurance Fund. Under this standard, the governmental assertion of necessity would be examined even more closely, and the availability of alternative means of achieving its goals would be carefully scrutinized. *See U.S. Trust*, 431 U.S. at 30-31. *See also Lynch v. United States*, 292 U.S. 571, 580 (1934) ("To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.").

10. The retroactive abrogation of the borrowed employee defense can, at most, net the Government Insurance Fund the workmen's compensation paid in those cases-$110,000. *See* 3d Cir. App. at 191-92. Furthermore, such uncompensated transfer of funds violates the Taking Clause. See Part III A, *infra*.

(a creature of Congress) did not exercise its judgment in balancing the reasonableness of the legislation as an exercise of police power against the statute's obvious infringement upon contractual obligations.

The unreasonableness of the statute challenged in the instant case is comparable to the unreasonable statute in *Allied Structural Steel*, where this Court refused to defer to the Minnesota Legislature's determination of reasonableness and public policy with respect to the State's pension act, as that act affected only a limited number of private employment contracts. 438 U.S. at 234. The factors the *Allied Structural Steel* Court considered important included: the lack of a broad, generalized economic or social problem; a severe, permanent and immediate change in the contractual relationships of those within its coverage; and the extremely narrow focus of the legislation. Those same factors are present in the instant case; indeed, the situation is even worse here, where there is also an asserted governmental self-interest.

Here, the challenged amendment affected only the few cases pending at the time of its enactment; it nullified the implied term of Hess' contractual obligations with borrowed employees and imposed a completely unexpected liability. No special conditions lessen that ultimate impact. As in *Allied Structural Steel*, 438 U.S. at 247, there was no "provision for gradual applicability or grace periods," nor was the retroactive statute enacted to deal with a situation comparable to the desperate emergency economic conditions of the Great Depression, *see Blaisdell*, 290 U.S. at 398.

The retroactive nature of the challenged statute greatly interfered with--even abrogated--the labor brokerage contract between Litwin and Hess. Hess, as a business practice, paid the workmen's compensation premiums of Litwin-supplied laborers. This well-

established business custom was supported by Hess' reasonable, long-standing assumption, affirmed in *Vanterpool*, 766 F.2d at 125, that the borrowed employee doctrine applied in the Virgin Islands, as it does in most states.

E. *Hess' Expectations Were Reasonable*

Petitioners maintain that the workmen's compensation scheme constitutes a heavily regulated industry. Pet. for Cert. at 6. First, workmen's compensation is not an industry at all. Second, the existence of heavy regulation is relevant in a Contract Clause case only insofar as the expectations of the participants in a regulated industry are concerned. *See, e.g., Energy Reserves Group*, 459 U.S. at 415 ("at the time of the execution of the contracts, ERG did not expect to receive deregulated prices"); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940) (when one purchases into an enterprise "already regulated *in the particular* to which he now objects, he purchase[s] subject to further regulation *upon the same topic*") (emphasis added). The "expectations" in those cases were that additional regulation *in furtherance* of some long-existing state scheme could occur.

Here, though, the retroactive amendment does not further the aims of the workmen's compensation scheme in the Virgin Islands. Rather, for the sake of only six plaintiffs, and the possible temporary loss to the Government Insurance Fund of some $110,000, *see* 3d Cir. App. at 191-92, the legislature has "regulated" in a manner completely contrary to the goals of the compensation system--the certain recovery by an injured worker, and tort immunity of employers. This retroactive statute runs counter to the existing rationale and operation of the system, and cannot be considered similar in character to those state systems considered in *Energy Reserves Group* or *Veix*.

F. *This Targeted Legislation Cannot Pass Constitutional Muster*

Petitioners cannot justify the legislative decision to

benefit only six plaintiffs by pointing to the small size of the Virgin Islands. Pet. for Cert. at 7. The retroactive statute targets and greatly *burdens* a single entity--Hess. This burden is not a mere incident of population size. As the Explanation to the statute *itself* acknowledges, Hess was directly targeted to bear the burden. *See Nieves*, 819 F.2d at 1250 (Pet. for Cert. at A-27); "Statement of the Case," *supra*, at 3-5. The statute invalidated in *Allied Structural Steel* also had a very specific application to a particular employer. 438 U.S. at 248-49. No legitimate public purpose justifies targeting a single party to bear a substantial burden which should be legislatively addressed in a general fashion. Indeed, the Founding Fathers insisted upon the Contract Clause and similar constitutional provisions which require *generality* in legislation precisely because they were concerned about the potentially oppressive power of local majorities. *See* Part III B, *supra*. By definition, a "legitimate public purpose" *cannot* exist where the class of special beneficiaries and burdened entities is so minute.

III. ADDITIONAL SUBSTANTIAL CONSTITUTIONAL GROUNDS SUPPORT THE COURT OF APPEALS' DECISION

As noted above, the Court of Appeals for the Third Circuit correctly ruled that the retroactive statute violates the Contract Clause of the Virgin Islands Organic Act. It was, therefore, unnecessary for that Court to reach Respondent Hess' other substantial constitutional challenges.[11] It is, however, well-established that "the prevailing party may defend a judgment on any ground which the law and record permit." *See, e.g., United States v. New York Tele. Co.*, 434 U.S. 159, 166 n.8 (1977). *Accord Whitley v. Albers*, 106 S.Ct. 1078, 1088 (1986).

11. In the unlikely event that this Court were to grant certiorari and reverse that well-reasoned decision of the Third Circuit, it would then be necessary for this Court, or the Third Circuit, to rule upon these properly preserved and substantial constitutional claims.

The retroactive abrogation of the borrowed servant doctrine constitutes a taking of Respondent Hess' private property without just compensation[12] and a deprivation of Hess' property without due process of law.[13] Congress has consistently and repeatedly required that the territorial government of the Virgin Islands comply with the strictures of the Taking Clause[14] and due process.[15]

A. *The Retroactive Legislation Constitutes a Taking of Property Without Just Compensation*

The Taking Clause prevents government from imposing the cost of a general public benefit upon a private party without compensating that private party. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (Marshall, J.); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, 153 (1978) (Rehnquist, J., dissenting); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). It "stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The Virgin Islands retroactive law violates this clause by taking vested property rights without compensation.

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12. "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V.

13. "No State shall. . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

14. The original Organic Act of the Virgin Islands, ch. 699, §34, 49 Stat. 1807 (1936), included a Taking Clause, and that requirement continues to be applicable under the Revised Organic Act of the Virgin Islands, 48 U.S.C. §1561 (1982).

15. The original Organic Act of the Virgin Islands, ch. 699, §34, 49 Stat. 1807, 1815 (1936), mandated: "No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law. . . ." This language is reiterated in the Revised Organic Act of the Virgin Islands, 48 U.S.C. §1561 (1982).

1. *Hess Has Vested Property Rights*

Contract rights are a form of property. *U.S. Trust Co.*, 431 U.S. at 19, n.16. *See also Thorpe v. Housing Auth.*,. 393 U.S. 268, 278 n.31 (1969); *Lynch v. United States*, 292 U.S. 571 (1934). So are statutory entitlements. *Fuentes v. Shevin*, 407 U.S. 67 (1972). Furthermore, vested rights include causes of action and defenses which can bar those actions. *Pritchard v. Norton*, 106 U.S. 124, 132 (1882) ("[W]hether [a right of action] springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defence is equally protected."). *Accord Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338 (1922)(Holmes, J.); *Barr v. Preskitt*, 389 F.Supp. 496, 498 (M.D. Ala. 1975); *Hutton v. Autoridad Sobre Hogares de la Capital*, 78 F.Supp. 988, 994 (D.P.R. 1948) (collecting cases).

The various contractual arrangements among Hess, its labor broker Litwin, and its employees (supplied to Hess by Litwin) constitute reasonable, investment-backed expectations, and, therefore, certainly exceed any definition of a "unilateral expectation or abstract need." *See Webb's*, 449 U.S. at 161. *See also* Part II, *supra*. The retroactive alteration and abrogation of these provisions fundamentally realigns the parties' positions during the pendency of these very lawsuits.

2. *There Was a Taking of This Property*

As the Third Circuit correctly observed:

> Since the retroactive application provision was designed to abolish Hess' tort immunity on behalf of those six plaintiffs, it can hardly be viewed as general legislation for the public welfare.

Nieves, 819 F.2d at 1250 (Pet. for Cert. at A-27). *See also*

id. at 1250 n.11; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232, 1243 (1987). The retroactive statute extinguished Hess' long-standing tort immunity, thereby imposing upon Hess substantial financial liability for alleged *prior* injuries and denying Hess a right secured by contract and by a legal defense. *See also* Part II, *supra*. The Taking here is a much more severe deprivation of property than the New York law invalidated in *Loretto*, which transferred a mere 1/8 of a cubic foot of space from one set of private owners to others. 458 U.S. at 422, 443.

3. *This Taking of Substantial Property Was Uncompensated*

The Virgin Islands act invalidated in this case was designed to create new, multi-million dollar tort remedies--damages prayed for against Hess totaled $5.5 million--for a handful of plaintiffs in already pending cases. The secondary purpose was to increase the revenues of the Government Insurance Fund, all at the substantial expense of Hess, without the payment of any compensation whatsoever.

The Third Circuit rightly condemned helping the Government Insurance Fund as a justification:

> Almost any arrangement would then be subject to impairment in order to benefit a potentially faltering or floundering fund. While the need to keep the workmen's compensation fund on a sound financial basis may justify prospective legislation designed for that purpose, it cannot justify this type of retrospective legislation.

Nieves, 819 F.2d at 1252 (Pet. for Cert. at A-30).

Likewise, in *Webb's*, 449 U.S. at 163, this Court unanimously found expropriation of interest on funds deposited in interpleader cases constituted "a forced contribution to general governmental revenues, . . . not reasonably related to the costs of using the courts." *Id.* at

163. *See also Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141, 3147 n.4 (1987) (Taking Clause bars "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.")

B. *The Retroactive Amendment Violates Due Process*

1. *The Legislation is Irrational*

To withstand scrutiny under the Due Process Clause, a challenged statute must be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guaranty Corp. v. R.A. Gray Co.*, 467 U.S. 717, 729 (1984). *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-19 (1976). Furthermore, retroactive application of a statute is inappropriate when it will produce "substantial inequitable results." *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Nieves*, 819 F.2d at 1251; *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939, 943-44 (3d Cir. 1985). The *Vanterpool* court rightly applied this standard when it found the original 1984 Virgin Islands legislation to be prospective only. *See* 776 F.2d at 119 n.1.[16]

The Third Circuit correctly concluded that "there was no general welfare to be served by the 1986 retroactive application provision." *Nieves*, 819 F.2d at 1251 (Pet. for Cert. at A-30), explaining that legislation "aimed retroactively to benefit or burden a few identifiable persons is particularly vulnerable to the charge that it is not reasonably related to the asserted public purposes." *Id.* at 1249 (Pet. for Cert. at A-26). Even Petitioners acknowledge that the burden of the retroactive Virgin Islands statute falls entirely on Respondent Hess. Pet. for Cert. at 7.

16. Respondent Hess has not challenged the 1984 statute which *prospectively* abolished the borrowed employee doctrine. That 1984 statute does adjust the benefits and burdens of economic life to promote the common good. *Penn Central*, 438 U.S. at 124.

This statute, therefore, comes within this Court's warning that the Due Process Clause prohibits "retrospective civil legislation [whose] consequences are particularly 'harsh and oppressive'." *See U.S. Trust Co.*, 431 U.S. at 17 n.13, *quoting Welch v. Henry*, 305 U.S. 134, 147 (1938). The extreme penalty levied directly upon Respondent Hess in this case certainly cannot qualify as an "apportioning" of governmental costs. *See United States v. Darusmont*, 449 U.S. 292, 298 (1981) (per curiam), *quoting Welch v. Henry*, 305 U.S. at 146-47. Rather, the statute represents a denial of the fairness at the very heart of due process of law.

2. *Tageted Legislation Violates Due Process*

Legislatures (state assemblies, territorial legislatures, and even Congress) must act like *legislatures*, i.e. they must legislate prospectively, impartially, and with generality, rather than make particularized decisions which only punish or benefit specific individuals. *See, e.g., Nixon v. Administrator of General Services*, 433 U.S. 425, 484-86 (1977)(Stevens, J., concurring); *United States v. Brown*, 381 U.S. 437, 442-47, 454 n.29 (1965); *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201-02 (1928); *Hurtado v. California*, 110 U.S. 516, 535-36 (1884); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-39 (1810). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 463, 474-76, 491-92, 495-96, 499, 504, 1141 (1978); THE FEDERALIST No. 48 (J. Madison); Note, *The Bounds of Legislative Specification*, 72 Yale L.J. 330, 344-47 (1962).

Courts, in turn, decide particular cases under those general laws. *See, e.g., INS v. Chadha*, 462 U.S. 919, 960-62, 966-67 (1983) (Powell, J., concurring). It is clearly a violation of these basic principles for a legislature to specify a rule of decision in a particular, pending case. *See United States v. Klein*, 80 U.S. 128, 146-47 (1871).

In a recent case quite similar to the facts of the instant case, a federal court rightly invalidated a Washington state statute designed to alter the course of pending federal litigation. The court wrote:

> The 1986 Amendment represents an attempt by the Washington Legislature to protect its constituents from the consequence of pending litigation. That is an unconstitutional intrusion on the judicial responsibility to resolve cases and controversies.

In re *Washington Public Power Supply System Securities Litigation*, MDL No. 551 (W.D. Wash. April 30, 1987) (Browning, J.). *See also RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1204 (2d Cir. 1987) ("the granting of a retroactive increase in sewer rates cannot be considered legislative action").

CONCLUSION

The retroactive application of the Virgin Islands statute abrogating the borrowed servant doctrine substantially impairs the obligations of Hess' contracts in violation of the Virgin Islands Contract Clause. Furthermore, this territorial legislation constitutes a Taking of Hess' private property without Just Compensation, and it denies Due Process of law. As the Third Circuit's ruling raises no important, unsettled issues and is correct-on several grounds--there is no need for this Court to review the case. Respondent Hess, therefore, urges this Court to deny the Petition.

Respectfully submitted,

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The assistance provided by Terry E. Allbritton, Esq., Stacy White, Esq., Rebecca King, and Andrew Simpson is gratefully acknowledged.